UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Plasido Fuentes Cordero

Petitioner,

v.

Markwayne Mullin, in his Official Capacity, Secretary of the U.S. Department of Homeland Security; Todd Blanche, in his Official Capacity, Acting Attorney General of the United States; Rodney S. Scott, in his Official Capacity, Commissioner, U.S. Customs and Border Protection; Juan Di Bella, in his Official Capacity, Patrol Agent in Charge, Wellesley Island Border Patrol Station, U.S. Border Patrol, Buffalo Sector.

Respondents.

Civil Action No.
9:26-cv-01381 (ECC)

FEDERAL RESPONDENTS' RESPONSE TO PETITION

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Acting Attorney General

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PRELIMINARY STATEMENT

Petitioner Plasido Fuentes Cordero ("Petitioner") seeks habeas relief arising from his arrest and detention by the Department of Homeland Security, including U.S. Customs and Border Protection ("CBP") and U.S. Immigration and Customs Enforcement ("ICE"). Although DHS initially identified 8 U.S.C. § 1225(b)(2)(A) as the statutory basis for Petitioner's detention, Respondents acknowledge that, under the Second Circuit's recent decision in *Barbosa da Cunha v. Freden*, 175 F.4th 61 (2d Cir. 2026), Petitioner's detention is governed by 8 U.S.C. § 1226(a).

That initial statutory determination does not entitle Petitioner to immediate release. Petitioner was served with the applicable charging and custody documents, placed in removal proceedings, and afforded the opportunity to obtain an individualized custody determination before an Immigration Judge pursuant to § 1226(a). His custody redetermination is forthcoming. Those are the procedures contemplated by § 1226(a).

Petitioner's remaining claims likewise fail. CBP had probable cause to believe that Petitioner was unlawfully present in the United States and reasonably determined that he was likely to escape before an administrative warrant could be obtained. Petitioner could not produce documentation establishing lawful status, DHS records identified no lawful status or pending immigration benefit, and the circumstances of the mobile roadside encounter indicated that he could depart the area or otherwise become difficult to locate before a warrant was obtained. His warrantless arrest was therefore authorized by 8 U.S.C. § 1357(a)(2).

Nor does any temporary delay in completing administrative processing or transferring Petitioner from CBP to ICE custody provide a basis for habeas relief. Petitioner was advised of his rights, served with the necessary documents, processed for removal proceedings, and has not shown that any delay caused prejudice or deprived him of a constitutionally required procedure.

Finally, Petitioner is not entitled to a burden-shifted initial bond hearing. Under § 1226(a), its implementing framework, and applicable precedent, Petitioner bears the burden of demonstrating that release is warranted unless and until detention becomes sufficiently prolonged to require additional procedural safeguards. Petitioner has been detained only since July 9, 2026, and his detention has not approached that point.

Accordingly, the Petition, including any request for attorneys' fees or other additional relief, should be denied.

FACTUAL BACKGROUND

On the early morning of July 9, 2026, U.S. Border Patrol Agent Juan Di Bella was conducting targeted immigration-enforcement operations in Watertown, New York. Di Bella Decl. ¶ 5; Ex. A at 2. During the operation, he observed a vehicle bearing Connecticut license plates traveling toward worksites known to employ temporary labor crews, including individuals suspected of being unlawfully present in the United States. Di Bella Decl. ¶¶ 6–7; Ex. A at 2. Petitioner Plasido Fuentes Cordero was the passenger in the vehicle, which was driven by its registered owner, Asencion Fuentes Cordero. Di Bella Decl. ¶ 8; Ex. A at 2.

As Agent Di Bella's vehicle approached, both occupants repeatedly looked toward his vehicle, appeared nervous and unusually attentive to his presence, and reduced their speed. Di Bella Decl. ¶ 10; Ex. A at 2. A records check showed that the vehicle was registered to the driver and was associated with a prior U.S. Border Patrol immigration encounter in Arizona. Di Bella Decl. ¶ 9; Ex. A at 2. Based on the occupants' behavior, the vehicle's out-of-state registration, the early hour, its direction of travel, the records-check results, and similar immigration encounters in the area, Agent Di Bella stopped the vehicle to conduct an immigration inquiry. Di Bella Decl. ¶ 11.

Agent Di Bella identified himself in English and Spanish and conducted the inquiry in Spanish because the occupants spoke Spanish and had limited ability to communicate in English. Di Bella Decl. ¶ 12; Ex. A at 2–3. During the inquiry, he observed work clothing and equipment inside the vehicle consistent with individuals traveling to the local worksites known to the Agent. Di Bella Decl. ¶ 13; Ex. A at 3. Petitioner could not produce documentation establishing lawful immigration status, and the available DHS records reflected no lawful status, pending application, petition, appeal, or approved immigration benefit. Di Bella Decl. ¶¶ 14–18; Ex. A at 3–4.

Agent Di Bella also determined that Petitioner was likely to escape before an administrative warrant could be obtained. Di Bella Decl. ¶ 19; Ex. A at 6. Petitioner lacked documentation or lawful status, initially did not acknowledge that he was unlawfully present, and was encountered during a mobile roadside encounter early in the morning while traveling in an out-of-state vehicle toward temporary-labor worksites and away from any fixed location at which agents could readily locate him later. Di Bella Decl. ¶¶ 15, 20–21. Based on those circumstances, Agent Di Bella determined that Petitioner was likely to depart the area or otherwise become difficult to locate before an administrative arrest warrant could be obtained. Di Bella Decl. ¶¶ 20–21. Agent Di Bella therefore arrested Petitioner pursuant to 8 U.S.C. § 1357(a)(2) and transported him to the Wellesley Island Border Patrol Station for processing. Di Bella Decl. ¶¶ 21–22; Ex. A at 3.

During processing, Petitioner stated that he had entered the United States from Mexico near Nogales, Arizona, without inspection or admission on or about March 9, 2022. Di Bella Decl. ¶ 23; Ex. A at 3. Records checks confirmed that Petitioner had no lawful immigration status, prior immigration history, pending application, petition, appeal, or approved immigration benefit. Di Bella Decl. ¶ 24; Ex. A at 3.

Petitioner was advised of his administrative rights in removal proceedings and acknowledged that he understood those rights. Di Bella Decl. ¶ 25; Ex. A at 4–5, 7. He was also advised of his *Miranda* rights, signed Form I-214, and agreed to answer questions without an attorney present. Di Bella Decl. ¶ 26; Ex. A at 4. Petitioner was served with the applicable immigration charging and custody documents and processed for Notice to Appear-Detained removal proceedings. All necessary forms to initiate those proceedings were served on July 9, 2026.[1] Di Bella Decl. ¶ 27; Ex. A at 5. Although DHS initially treated Petitioner as subject to detention under 8 U.S.C. § 1225(b), his detention is governed by 8 U.S.C. § 1226(a). Di Bella Decl. ¶ 28; Ex. A at 5.

Petitioner remained temporarily in CBP custody while CBP completed the required administrative processing and arranged for his transfer to U.S. Immigration and Customs Enforcement. Di Bella Decl. ¶ 29; Ex. A at 5. Upon information and belief, the transfer was delayed because bed space was not immediately available at the Buffalo Federal Detention Facility in Batavia, New York. Once bed space became available, Petitioner was transferred to that facility. Di Bella Decl. ¶ 30.

Petitioner has been afforded the opportunity to seek an individualized custody redetermination before an Immigration Judge. Di Bella Decl. ¶ 31; Ex. A at 7. Upon information and belief, Petitioner remains in DHS custody at the Buffalo Federal Detention Facility pending further immigration proceedings and a forthcoming individualized custody determination. Di Bella Decl. ¶ 32.

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[1] The Form I-213 reflects that Petitioner was initially served with a Notice to Appear on July 9, 2026. Because the original Notice to Appear contained an error, however, undersigned counsel was advised by ICE counsel that a corrected Notice to Appear was served and filed on July 20, 2026, as reflected in Exhibit A.

ARGUMENT

I. PETITIONER'S DETENTION IS GOVERNED BY 8 U.S.C. § 1226(a)

Respondents have maintained that § 1225(b)(2)(A) subjects noncitizens who are present in the United States without having been inspected, admitted, or paroled to mandatory detention. See *Matter of Yajure Hurtado*, 29 I. & N. Dec. 216, 228 (BIA 2025). Respondents acknowledge, however, that the Second Circuit recently rejected that interpretation in *Barbosa da Cunha*, 175 F.4th 61[2].

In *Da Cunha*, the Second Circuit held that § 1225(b)(2)(A) does not apply to noncitizens who entered the United States without inspection or admission but were not apprehended while entering the country or shortly thereafter. *Id.* at 69. Rather, the court concluded that the detention of such individuals is governed by § 1226(a). *Id.* Respondents respectfully acknowledge that *Da Cunha* controls here and that Petitioner's detention is governed by § 1226(a).

Respondents also respectfully note that the Court's prior decisions independently support the conclusion that § 1226(a), rather than § 1225(b)(2)(A), governs Petitioner's detention. See, e.g., *Perdomo Perez v. Akshar*, No. 9:26-cv-00120-ECC, Dkt. No. 19, at 3–5 (N.D.N.Y. Mar. 5, 2026); *Bravo Perez v. Bondi*, No. 9:26-cv-00205-ECC, Dkt. No. 10, at 2 (N.D.N.Y. Feb. 20, 2026) (rejecting the argument that noncitizens who previously entered and reside in the United States are

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[2] On June 22, 2026, the government filed a petition in the United States Supreme Court seeking a writ of certiorari from the Sixth Circuit's decision in *Lopez-Campos v. Raycraft*, No. 25-1965 (May 11, 2026). *See Raycraft v. Lopez-Campos*, No. 25-1545 (Sup. Ct. June 22, 2026). The petition asks the Supreme Court to resolve a deepening Circuit split, of which *Barbosa da Cunha* is part, by addressing: (1) whether 8 U.S.C. § 1225(b)(2)(a) mandates the detention pending removal proceedings of aliens who are present in the United States without having been admitted, and (2) whether detaining such aliens without a bond hearing during their removal proceedings comports with due process.

subject to mandatory detention under § 1225(b)(2)(A) and concluding that § 1226(a) governs their detention).

Petitioner is presently detained under § 1226(a), has been afforded the opportunity to seek an individualized custody redetermination before an Immigration Judge, and has a custody determination forthcoming. Di Bella Decl. ¶¶ 28, 31–32. The Form I-213's initial reference to § 1225(b)(2) does not establish that Petitioner is currently detained without statutory authority or otherwise entitle him to immediate release. Petitioner was advised of his administrative rights, served with the applicable immigration charging and custody documents, issued a Notice to Appear, and processed for removal proceedings. Di Bella Decl. ¶¶ 25–28, 31; Ex. A at 4–5, 7. Because Petitioner has received and remains able to pursue the custody-review procedures available under § 1226(a), the Form I-213's initial reference to § 1225(b)(2) provides no basis for immediate habeas relief.

II. PETITIONER'S WARRANTLESS ARREST WAS AUTHORIZED BY 8 U.S.C. § 1357(a)(2)

Petitioner contends that his arrest was unlawful because Agent Di Bella did not first obtain a warrant. That argument overlooks the express authority conferred by 8 U.S.C. § 1357(a)(2).

Although § 1226 generally contemplates arrest pursuant to an administrative warrant, § 1357(a)(2) expressly authorizes an immigration officer to arrest a noncitizen without a warrant when the officer has reason to believe that the individual is unlawfully present in the United States and is likely to escape before a warrant can be obtained. Section 1357 also authorizes immigration officers to interrogate individuals concerning their right to be or remain in the United States. 8 U.S.C. § 1357(a)(1)–(2); see *United States v. Laija-Garcia*, 347 F. Supp. 2d 350, 358–59 (W.D. Tex. 2004), aff'd, 110 F. App'x 411 (5th Cir. 2004).

Both requirements of § 1357(a)(2) were satisfied here.

A. The CBP Agent Had Reason to Believe That Petitioner Was Unlawfully Present in the United States

Section 1357(a)(1) permits immigration officers to interrogate and temporarily detain an alien upon "circumstances creating a reasonable suspicion, not arising to the level of probable cause to arrest, that the individual so detained is illegally in this country." *Au Yi Lau v. U.S. Immigr. & Naturalization Serv.*, 445 F.2d 217, 223 (D.C. Cir. 1971). For an arrest, however, the "reason to believe" standard under § 1357(a)(2) is equivalent to probable cause. See *Avila-Gallegos v. Immigr. & Naturalization Serv.*, 525 F.2d 666, 667 (2d Cir. 1975); *Ojeda-Vinales v. Immigr. & Naturalization Serv.*, 523 F.2d 286, 288 (2d Cir. 1975); *Polanco v. United States*, 2014 WL 795659, at 5 (E.D.N.Y. Feb. 27, 2014) ("Reason to believe has been defined as requiring probable cause." (citing *Avila-Gallegos*, 525 F.2d at 667, and *Ojeda-Vinales*, 523 F.2d at 288)).

Probable cause is evaluated under the totality of the circumstances and may rest on reasonably trustworthy information obtained through immigration records checks, the individual's responses during a lawful immigration inquiry, and the individual's inability to provide documentation or other verifiable information establishing lawful status. See *United States v. Sanchez*, 635 F.2d 47, 62–63 (2d Cir. 1980) (concluding that the defendant's failure to produce required[3] immigration documentation and inability to provide details concerning his status justified his arrest); *Chi Yuan Chen v. Gonzales*, 224 F. App'x 116, 118 (2d Cir. 2007) (finding probable cause based on information obtained during questioning and the individual's failure to

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[3] Every alien over the age of eighteen is required to always carry with him evidence of registration as an alien. 8 U.S.C. § 1304(e). Failure to do so is a misdemeanor. *See Maryland v. Pringle*, 540 U.S. 366, 370, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003) ("A warrantless arrest of an individual in a public place for a felony, or a misdemeanor committed in the officer's presence, is consistent with the Fourth Amendment if the arrest is supported by probable cause."); *Inter-Neighborhood Hous. Corp. v. N.L.R.B.*, 124 F.3d 115, 121 (2d Cir. 1997) (noting that "giving false statements to the government is a felony, *see* 18 U.S.C. § 1001").

produce documentation establishing lawful status); *United States v. Galindo-Hernandez*, 674 F. Supp. 979, 985 (E.D.N.Y. 1987) (finding probable cause where the defendant's expired visa, together with his inability to produce documentation refuting unlawful status, provided sufficient grounds for arrest); see also *United States v. Aragon-Ruiz*, 551 F. Supp. 2d 904, 909–10 (D. Minn. 2008).

Before arresting Petitioner, Agent Di Bella conducted records checks showing that the vehicle was registered to the driver and was associated with a prior U.S. Border Patrol immigration encounter in Arizona. Di Bella Decl. ¶ 9; Ex. A at 2. The records available to Agent Di Bella did not identify any lawful immigration status, pending application, petition, appeal, or approved immigration benefit associated with Petitioner. Di Bella Decl. ¶ 17; Ex. A at 3.

Petitioner could not produce documentation establishing that he was lawfully present in the United States, and the DHS records available to Agent Di Bella reflected no lawful status or pending immigration benefit. Di Bella Decl. ¶¶ 14, 16–18; Ex. A at 3–4.

Those facts provided an individualized and objective basis for Agent Di Bella to believe that Petitioner was unlawfully present in the United States. Petitioner's subsequent admission that he had entered the United States near Nogales, Arizona, without inspection or admission further confirmed Agent Di Bella's determination. Di Bella Decl. ¶¶ 23–24; Ex. A at 3.

B. The CBP Agent Reasonably Determined That Petitioner Was Likely to Escape Before a Warrant Could Be Obtained

The second condition imposed by § 1357(a)(2) for a warrantless arrest is a likelihood that the noncitizen might escape before a warrant can be obtained. Petitioner has not argued that this condition was not satisfied here.

Agent Di Bella reasonably determined that Petitioner was likely to escape before an administrative warrant could be obtained. Di Bella Decl. ¶¶ 19–21; Ex. A at 6.

At the time of the arrest, Petitioner could not provide documentation authorizing his presence in the United States, and records checks revealed no lawful immigration status, pending application, petition, appeal, or approved immigration benefit associated with him. Di Bella Decl. ¶¶ 14, 16–18, 24; Ex. A at 3–4. Petitioner was encountered during a mobile roadside encounter early in the morning while traveling as a passenger in an out-of-state vehicle toward temporary-labor worksites and away from any fixed location at which agents could readily locate him later. Di Bella Decl. ¶¶ 8, 20–21; Ex. A at 2–3.

Under those circumstances, Agent Di Bella reasonably determined that releasing Petitioner while an administrative warrant was sought created a risk that Petitioner would depart the area or otherwise become difficult to locate. Di Bella Decl. ¶¶ 20–21. Section 1357(a)(2) does not require certainty that an individual will flee. It requires a reasonable determination, based on the facts known to the officer at the time, that the individual is likely to escape before a warrant can be obtained. That standard was satisfied here.

Petitioner's warrantless arrest was therefore authorized by § 1357(a)(2) and did not violate the Immigration and Nationality Act or the Due Process Clause.

III. PETITIONER HAS NOT BEEN DENIED DUE PROCESS

Petitioner's procedural due-process claim likewise fails because he has access to the very process that he claims has been denied: a prompt, individualized bond hearing before an Immigration Judge. Petitioner is detained pursuant to 8 U.S.C. § 1226(a), which authorizes the Attorney General either to continue detention or to release a noncitizen on bond or conditional parole pending completion of removal proceedings. See 8 U.S.C. § 1226(a). Consistent with that statutory framework, Petitioner may seek an individualized custody redetermination at which the Immigration Judge will consider whether his release would present a danger to the community or

a risk of flight. See 8 C.F.R. §§ 1236.1(d)(1), 1003.19; *In Re Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006).

Petitioner has not been denied access to those procedures. He was arrested on July 9, 2026, advised of his administrative rights, served with the applicable immigration charging and custody documents, and processed for removal proceedings. Di Bella Decl. ¶¶ 21–22, 25–27. He has been afforded the opportunity to seek an individualized custody redetermination before an Immigration Judge, and an individualized custody determination is forthcoming. *Id.* ¶¶ 31–32. Thus, this is not a case in which the Government has subjected Petitioner to prolonged detention without an opportunity to obtain individualized review. To the contrary, the administrative process is proceeding promptly, and the Immigration Judge will determine in the first instance whether continued detention is warranted.

The Second Circuit's decision in *Velasco Lopez v. Decker,* 978 F.3d 842 (2d Cir. 2020), does not support relief under these circumstances. There, the petitioner had been detained under § 1226(a) for approximately fifteen months, had undergone several unsuccessful bond hearings, and faced continued detention without any foreseeable endpoint. *Id.* at 846–48, 855. The court held that, under those circumstances, the length and indeterminate nature of the petitioner's detention required the Government to justify continued confinement at a new bond hearing. *Id.* at 855–57. The court did not hold that every person detained under § 1226(a) is constitutionally entitled to immediate release, an immediate federal-court-ordered bond hearing, or a hearing at which the Government bears the burden of proof from the outset of detention. Rather, its holding was expressly tied to the petitioner's prolonged incarceration and the resulting risk of an erroneous deprivation of liberty. *Id.* at 852–55.

Those concerns are absent here. Petitioner has been detained for only a brief period, his removal proceedings have only recently commenced, and he has been afforded the opportunity to seek an individualized custody redetermination before an Immigration Judge, which is forthcoming. Di Bella Decl. ¶¶ 27, 31–32. The ordinary administrative procedures governing § 1226(a) detention therefore provide adequate process at this stage. See *Mahmodi v. Marich*, No. 25-CV-6762-MAV, 2026 WL 113473, at *6–10 (W.D.N.Y. Jan. 15, 2026) (concluding that a recently detained noncitizen received constitutionally adequate process through an initial § 1226(a) bond hearing at which the noncitizen bore the burden of demonstrating that release was warranted).

Nor may Petitioner establish a present constitutional violation by speculating that the forthcoming hearing will be inadequate or that the Immigration Judge may deny bond. Due process requires a meaningful opportunity to be heard; it does not guarantee release or a favorable custody determination. Petitioner must first present his request for release to the Immigration Judge, who may evaluate the evidence, consider Petitioner's circumstances, and determine whether bond or conditional parole is appropriate. Any claim based on the procedures employed at that hearing—or on the resulting custody determination—is premature before the hearing occurs.

Accordingly, Petitioner has not demonstrated that the procedures available to him are constitutionally deficient. Because he has access to an individualized bond hearing before an Immigration Judge, his procedural due-process claim is premature and provides no basis for immediate habeas relief.

IV. THE TEMPORARY ADMINISTRATIVE AND TRANSFER DELAY DOES NOT PROVIDE AN INDEPENDENT BASIS FOR HABEAS RELIEF

Petitioner also argues that his continued detention in CBP custody following his arrest violated 8 C.F.R. § 287.3(d). That regulation governs certain administrative procedures following

a warrantless immigration arrest, including the determination whether the individual will remain in custody and the initiation of removal proceedings. It does not impose a fixed deadline for completing administrative processing or transferring a detainee to an ICE facility, nor does it require automatic release whenever either process is delayed.

Even assuming that Petitioner's transfer was delayed because bed space was not immediately available at the Buffalo Federal Detention Facility, he has not shown that the delay deprived him of any required procedure or otherwise caused prejudice. Di Bella Decl. ¶ 30. The record establishes that Petitioner was advised of his administrative and Miranda rights, served with the applicable immigration charging and custody documents, processed for removal proceedings, and maintained in DHS custody pending further immigration proceedings. *Id.* ¶¶ 25–30, 32; Ex. A at 4–5, 7. He has also been afforded the opportunity to seek an individualized custody redetermination before an Immigration Judge, and that custody determination is forthcoming. Di Bella Decl. ¶¶ 31–32.

Petitioner identifies no evidence that the temporary delay affected the charges against him, impaired his ability to seek relief in removal proceedings, prevented him from requesting a bond hearing, or altered the statutory basis for his detention. Nor does he identify any procedure required by § 287.3(d) that was ultimately denied. Accordingly, even if some aspect of Petitioner's processing or transfer was not completed as promptly as he believes it should have been, that delay does not establish unlawful detention or provide an independent basis for habeas relief.

V. PETITIONER BEARS THE BURDEN OF ESTABLISHING THAT RELEASE IS WARRANTED AT HIS INITIAL § 1226(a) BOND HEARING

Petitioner is not entitled to an initial bond hearing at which the Government bears the burden of proving by clear and convincing evidence that continued detention is necessary.

Section 1226(a) authorizes the Attorney General to detain a noncitizen pending a decision in removal proceedings and provides that the Attorney General "may release" the individual on bond or conditional parole. 8 U.S.C. § 1226(a)(1)–(2). Congress has granted the Executive broad discretion to determine whether, and under what conditions, a noncitizen should be released pending removal proceedings. See *Reno v. Flores*, 507 U.S. 292, 294–95 (1993).

The applicable administrative framework places the burden on the noncitizen to establish that release is warranted. The Board of Immigration Appeals has long held that "[t]he burden is on the alien to show to the satisfaction of the Immigration Judge that he or she merits release on bond." *In Re Guerra*, 24 I. & N. Dec. at 40.

Courts within the Second Circuit have likewise concluded that, at an initial bond hearing under § 1226(a), the noncitizen bears the burden of establishing that release is appropriate. See *Mahmodi v. Marich*, No. 25-CV-6762-MAV, 2026 WL 113473, at *6 (W.D.N.Y. Jan. 15, 2026). *Mahmodi* further held that requiring a recently detained noncitizen to bear that burden is consistent with due process under *Mathews*. *Id.* at *7–10. Although the noncitizen's liberty interest is substantial, the court explained that the risk of an erroneous deprivation at an initial § 1226(a) bond hearing is limited because the noncitizen receives an individualized hearing before a neutral Immigration Judge, may present evidence and testimony, may be represented by counsel, and may seek administrative review of an adverse custody determination. *Id.* The court also concluded that shifting the burden to the Government at the outset of detention would provide limited additional procedural protection, particularly where the noncitizen is generally in the best position to present evidence concerning matters such as community ties, family relationships, employment history, criminal history, and the availability of a suitable release plan. *Id.* Finally, the court recognized the Government's substantial interest in administering the immigration-detention system, ensuring

appearance at removal proceedings, protecting the public, and avoiding the additional fiscal and administrative burdens that would result from requiring the Government to prove dangerousness or flight risk in every initial bond proceeding. *Id.* Balancing those considerations, *Mahmodi* concluded that due process does not require the Government to bear the burden at an initial bond hearing held shortly after detention. *Id.* at *10.

That conclusion accords with the statutory framework discussed in *Jennings v. Rodriguez*, 583 U.S. 281 (2018). There, the Supreme Court rejected a construction of § 1226(a) that would require the Government to prove by clear and convincing evidence that continued detention is necessary or to provide periodic bond hearings. *Id.* at 301–03. The Court emphasized that § 1226(a) provides only that the Attorney General "may release" a noncitizen and does not assign the burden of proof to the Government. *Id.*

The Second Circuit's decision in *Velasco Lopez*, 978 F.3d 842, does not require a different result. There, the court required the Government to bear the burden of proof only after concluding that the petitioner's detention had become unreasonably prolonged. *Id.* at 854. Petitioner here has been detained only since July 9, 2026. His detention is recent, and he has not been subjected to the type of prolonged confinement that may warrant additional procedural protections.

Accordingly, neither § 1226(a), its implementing framework, nor the Due Process Clause requires the Government to bear the burden at Petitioner's initial bond hearing. The hearing should proceed under the ordinary framework, with Petitioner bearing the burden of demonstrating that he is not a danger to the community or a flight risk and that his release is warranted.

VI. ANY REQUEST FOR ATTORNEY'S FEES IS PREMATURE

Any present application for attorney's fees under the Equal Access to Justice Act ("EAJA") is premature.

The EAJA requires a fee application to be filed within thirty days after a "final judgment," defined as a judgment that is "final and not appealable." 28 U.S.C. § 2412(d)(1)(B), (d)(2)(G). The thirty-day filing period therefore does not begin until a final judgment has been entered and the time to appeal has expired. *Melkonyan v. Sullivan*, 501 U.S. 89, 96 (1991).

An EAJA application filed before that point is premature. See *United States v. 27.09 Acres of Land*, 1 F.3d 107, 111 (2d Cir. 1993); *Barbour v. Colvin*, No. 12-CV-00548 ADS, 2013 WL 7206218, at *1 (E.D.N.Y. Aug. 1, 2013).

No final judgment has been entered in this matter. Accordingly, any request for attorney's fees under the EAJA should be denied without prejudice as premature.

CONCLUSION

For the foregoing reasons, the Petition should be denied. Although Respondents acknowledge that Petitioner's detention is governed by 8 U.S.C. § 1226(a), rather than § 1225(b)(2)(A), Petitioner is receiving the procedures available under § 1226(a), including access to an individualized custody determination before an Immigration Judge.

Petitioner's warrantless arrest was authorized by 8 U.S.C. § 1357(a)(2), any temporary delay in administrative processing or transfer did not prejudice him or deprive him of a required procedure, and he is not entitled to shift the burden of proof to the Government at his initial bond hearing. Any request for attorney fees under the EAJA is also premature.

Respondents therefore respectfully request that the Court deny the Petition and grant such other and further relief as the Court deems appropriate.

Dated: July 22, 2026

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