UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Asencion 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-01382 (ECC)

FEDERAL RESPONDENTS' RESPONSE TO PETITION

TODD BLANCHE
Acting Attorney General

JOHN A. SARCONE III
First Assistant United States Attorney

By: Alexis M. Osborne
Assistant United States Attorney
Bar Roll No. 707475

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

FACTUAL BACKGROUND 2

ARGUMENT 2

I. Petitioner Detention is Governed by 8 U.S.C. § 1226(a) 4

II. Petitioner's Warrantless Arrest of Petitioner Was Authorized By 8 U.S.C. § 1357(a)(2) 5

A. The CBP Agent Had Reason to Believe That Petitioner Was Unlawfully Present in the United States 6

B. The CBP Agent Reasonably Determined That Petitioner Was Likely to Escape Before a Warrant Could Be Obtained 8

III. Petitioner Has Not Been Denied Due Process 8

IV. The Temporary Administrative and Transfer Delay Does Not Provide An Independent Basis For Habeas Relief 11

V. Petitioner Bears the Burden of Establishing that Release Is Warranted At His Initial § 1226(a) Bond Hearing 12

VI. Any Request for Attorney's Fees is Premature 14

CONCLUSION 14

PRELIMINARY STATEMENT

Petitioner Asencion Fuentes Cordero ("Petitioner"),[1] previously known to the Department of Homeland Security as Asencion Cordero Fuentes, 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 the Form I-213 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 notation does not entitle Petitioner to immediate release. Petitioner was served with charging documents, placed in removal proceedings, and afforded the opportunity to obtain an individualized custody determination before an Immigration Judge pursuant to 8 U.S.C. § 1226(a). His bond hearing 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. 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, processed for removal proceedings, and has not shown that any delay caused prejudice or deprived him of a constitutionally required procedure.

---

[1] On July 22, 2026, Agency Counsel for ICE advised undersigned counsel that Petitioner's correct surname appears to be "Cordero Fuentes," rather than "Fuentes Cordero." For consistency with the caption, however, Respondents refer to Petitioner's surname as "Fuentes Cordero."

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. ¶¶ 5–6; Ex. A at 1. 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 Asencion Fuentes Cordero was driving the vehicle, and Plasido Fuentes Cordero was the passenger. Di Bella Decl. ¶ 8; Ex. A at 2.

As Agent Di Bella's vehicle pulled behind the vehicle driven by Petitioner, the occupants repeatedly looked toward his vehicle, appeared nervous, and reduced their speed. Di Bella Decl. ¶ 9; Ex. A at 2. A records check identified Petitioner as the registered owner but revealed no lawful immigration status, pending application, petition, appeal, or other immigration benefit. Di Bella Decl. ¶ 10; 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; Ex. A at 2.

During the inquiry, Agent Di Bella determined that Petitioner and his passenger were natives and citizens of Mexico. Di Bella Decl. ¶ 12; Ex. A at 3. Petitioner could not produce documentation establishing lawful immigration status, and the available DHS records reflected no lawful status or pending immigration benefit. Di Bella Decl. ¶¶ 13–15; Ex. A at 2–3. Agent Di Bella also determined that Petitioner was likely to escape before an administrative warrant could be obtained. Di Bella Decl. ¶¶ 16, 19; Ex. A at 6. Petitioner resided in Connecticut, was encountered in Watertown in a Connecticut-registered vehicle, and identified no substantial ties to the Watertown area that would permit agents to readily locate him later. Di Bella Decl. ¶¶ 17–18; Ex. A at 5–6. 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. ¶ 20; Ex. A at 3, 5.

During processing, Petitioner acknowledged that he lacked lawful immigration status and stated that he had entered the United States from Mexico near Nogales, Arizona, without inspection on or about September 20, 2021. Di Bella Decl. ¶¶ 21–22; Ex. A at 3, 6. Records checks confirmed that Petitioner had no lawful status or pending application, petition, appeal, or other identified basis for lawful presence. Di Bella Decl. ¶ 23; Ex. A at 2–3.

Petitioner was advised of his administrative and *Miranda* rights, served with the applicable immigration charging and custody documents, and processed for removal proceedings. Di Bella Decl. ¶¶ 24–25; Ex. A at 3–5, 7–8. Although DHS initially noted that Petitioner was subject to detention under 8 U.S.C. § 1225(b), Petitioner is presently detained pursuant to 8 U.S.C. § 1226. Di Bella Decl. ¶ 26.

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. ¶ 27; Ex. A at 5. Upon information and belief, the transfer was delayed in part by the lack of immediately available bed space at the Buffalo Federal Detention Facility and other procedural and logistical requirements. Di Bella Decl. ¶ 28. During that period, Petitioner remained in DHS custody while he was processed for removal proceedings under the Immigration and Nationality Act. Di Bella Decl. ¶ 29.

Petitioner was issued a Notice to Appear and has therefore been afforded the opportunity to seek an individualized custody redetermination before an Immigration Judge. Di Bella Decl. ¶ 30; Ex. A at 7–8. Upon information and belief, a bond hearing has not yet been scheduled but is forthcoming. Di Bella Decl. ¶ 30.

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 (B.I.A. 2025). Respondents acknowledge, however, that the Second Circuit recently rejected that interpretation in *Barbosa Da Cunha v. Freden*, 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

[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.

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

Petitioner is presently detained under § 1226, has been afforded the opportunity to seek an individualized custody redetermination before an Immigration Judge, and has a bond hearing forthcoming. Di Bella Decl. ¶¶ 26, 30. The erroneous notation on the Form I-213 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. ¶¶ 24–26, 30; Ex. A at 3–5, 7–8. 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 OF PETITIONER 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 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 that identified Petitioner as the registered owner of the vehicle but disclosed no lawful immigration status, pending application, petition, appeal, or other immigration benefit associated with him. Di Bella Decl. ¶ 10; Ex. A at 2.

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. ¶¶ 13–15; Ex. A at 2–3.

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 acknowledgment that he lacked lawful immigration status, together with his admission that he had

---

[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. NLRB*, 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").

entered the United States near Nogales, Arizona, without inspection, further confirmed Agent Di Bella's determination. Di Bella Decl. ¶¶ 21–23; Ex. A at 2–3, 6.

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. ¶¶ 16–19; Ex. A at 5–6.

At the time of the arrest, Petitioner could not provide documentation authorizing his presence in the United States, and records checks revealed no lawful status, pending application, petition, appeal, or other immigration benefit associated with him. Di Bella Decl. ¶¶ 13–15, 23; Ex. A at 2–3. Petitioner resided in Connecticut, was encountered in Watertown, New York, while driving a Connecticut-registered vehicle, and identified no substantial ties to the Watertown area that would permit agents to readily locate him later. Di Bella Decl. ¶¶ 17–19; Ex. A at 5–6.

Under those circumstances, Agent Di Bella reasonably determined that releasing Petitioner while an administrative warrant was sought created a risk that Petitioner would leave the area or otherwise become difficult to locate. Di Bella Decl. ¶¶ 18–19. 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; *Matter of Guerra*, 24 I. & N. Dec. 37, 40 (B.I.A. 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. ¶¶ 20, 24–25, 29–30. He has been afforded the opportunity to seek an individualized custody redetermination before an Immigration Judge, and, although a bond hearing has not yet been scheduled, one is forthcoming. *Id.* ¶ 30. 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 bond hearing that is forthcoming. Di Bella Decl. ¶¶ 29–30. 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 in part 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. ¶ 28. 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 under the Immigration and Nationality Act. *Id.* ¶¶ 24–25, 29–30; Ex. A at 3–5, 7–8. He has also been afforded the opportunity to seek an individualized custody redetermination before an Immigration Judge, and a bond hearing is forthcoming. Di Bella Decl. ¶ 30.

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." *Matter of Guerra*, 24 I. & N. Dec. 37, 40 (B.I.A. 2006).

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 v. Decker*, 978 F.3d 842 (2d Cir. 2020), 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

TODD BLANCHE
Acting Attorney General

JOHN A. SARCONE III
First Assistant United States Attorney

By: s/ Alexis M. Osborne
Alexis M. Osborne
Assistant United States Attorney
Bar Roll No. 707475