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August 17, 2026

VIA CM/ECF
Hon. Elizabeth C. Coombe
U.S. District Judge
Federal Building and U.S. Courthouse
P.O. Box 7255
Syracuse, NY 13261-7255

RE: *Cajilema v. Venturella, et al*
Civil Action No. 9:26-cv-1530 (ECC)

Dear Judge Coombe:

This Office represents the Respondents (the "Government") in this habeas corpus action, in which Petitioner Angel Quizhpi Cajilema, ("Petitioner") challenges his detention by U.S. Immigration and Customs Enforcement ("ICE"). On August 10, 2026, Petitioner filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 ("Petition"). Dkt. No. 1. The same day, the Court ordered the Government to respond to the Petition by August 17, 2026. Dkt. No. 2.

While reserving all rights, including the right to appeal, the Government respectfully submits this abbreviated letter response in lieu of a formal responsive memorandum of law to preserve the legal issues, conserve judicial and party resources, and expedite the Court's consideration of this matter. If the Court prefers to receive a formal memorandum of law, the Government will be happy to submit one upon request.

Petitioner is a native and citizen of Ecuador. Ex. A at 1.[1] On September 7, 2023, U.S. Border Patrol encountered Petitioner near the southern border shortly after he unlawfully entered the United States. *Id.* at 2. Petitioner did not express a fear of returning to Ecuador. *Id.* According to the Form I-213 prepared following that encounter, Petitioner was issued a Notice to Appear and released on an Order of Release on Recognizance ("OREC"). Exs. B, C. DHS subsequently issued a superseding Notice to Appear on November 9, 2023. Ex. D.

On August 10, 2026, ICE encountered Petitioner in Albany, New York, while he was a passenger in a vehicle associated with another noncitizen who was the subject of a final order of removal. Petitioner was taken into ICE custody pursuant to a Form I-200 administrative arrest warrant and remains detained pending completion of his removal proceedings. Exs. E, F.

[1] Exhibits "A" – "F" have been provided to undersigned counsel by agency counsel for ICE.

The Government acknowledges that, in *Barbosa da Cunha v. Freden*, 175 F.4th 61 (2d Cir. 2026), the Second Circuit held that § 1225(b)(2)(A) did not authorize the petitioners' mandatory detention under the circumstances presented and that their detention was instead governed by 8 U.S.C. § 1226(a). The Government has petitioned the Supreme Court for review of *da Cunha*[2] and respectfully preserves its position that § 1225(b) provides the applicable detention authority for certain noncitizens apprehended shortly after unlawful entry and initially processed under that provision.

Respondents recognize, however, that Petitioner was released from immigration custody on an OREC and remained at liberty in the United States for nearly three years before his re-detention on August 10, 2026. An OREC reflects DHS's exercise of release authority and, unlike parole under 8 U.S.C. § 1182(d)(5)(A), does not require the noncitizen to return to custody upon termination of parole. Although DHS maintains that a noncitizen apprehended shortly after unlawful entry and initially processed under § 1225(b) may subsequently be re-detained under that provision notwithstanding an intervening OREC release, Respondents acknowledge that under *da Cunha*, courts within this Circuit are likely to conclude that § 1226(a) governs re-detention after the noncitizen has been released into the United States.

Indeed, courts within this District and elsewhere in the Second Circuit have held that, under similar circumstances, a noncitizen's later re-detention is governed by § 1226(a), rather than § 1225(b). *See, e.g.*, *Ampuero v. Venturella*, No. 9:26-CV-1267 (MAD), 2026 WL 1983211, at *5–7 (N.D.N.Y. July 8, 2026) (concluding that the petitioner's release from immigration custody and subsequent residence in the United States placed his later detention within § 1226(a), notwithstanding his initial processing under § 1225(b), and ordering his immediate release); *Sisalema Rea v. Ball*, No. 9:26-CV-1248 (AMN), 2026 WL 1959270, at *2–4 (N.D.N.Y. July 2, 2026) (rejecting the argument that the petitioner's initial processing under § 1225(b)(1) distinguished *Barbosa da Cunha* and holding that § 1226(a) governed his later detention after he was released on an OREC and lived in the United States for more than two years); *Hernandez Villasmil v. Blanche*, No. 9:26-CV-713 (MAD), 2026 WL 1235068, at *5–6 (N.D.N.Y. May 5, 2026); *Torrez Arce v. Blanche*, No. 9:26-CV-501 (ECC), 2026 WL 1430509, at *2–4 (N.D.N.Y. May 21, 2026); *Ivonin v. Rhoney*, No. 6:25-CV-6673 (EAW), 2026 WL 199283, at *4 (W.D.N.Y. Jan. 26, 2026); *Rodriguez v. Venturella*, No. 9:26-CV-1440 (AMN), slip op. at 4–5 (N.D.N.Y. Aug. 11, 2026) (holding that § 1226(a) governed the petitioner's re-detention approximately four

[2] On July 23, 2026, the Government filed a petition for a writ of certiorari seeking review of the Second Circuit's decision in *da Cunha*. *See Rhoney v. Barbosa da Cunha*, No. 26-104 (U.S. July 23, 2026). The petition asks the Supreme Court to resolve whether 8 U.S.C. § 1225(b)(2)(A) mandates detention pending removal proceedings of noncitizens who are present in the United States without having been admitted. A similar certiorari petition arising from a decision of the Sixth Circuit is also pending. *See Raycraft v. Lopez-Campos*, No. 25-1545 (Sup. Ct. June 22, 2026) (asking the Supreme Court to resolve the same issue raised in *da Cunha*, as well as whether detaining such aliens without a bond hearing during their removal proceedings comports with due process).

years after his release from immigration custody and ordering his immediate release); *Qureshi v. Rhoney*, No. 9:26-CV-1439 (MAD), slip op. at 5–6 (N.D.N.Y. Aug. 11, 2026) (holding that § 1226(a) governed where the petitioner's re-detention more than three years after his initial border encounter was not a continuation of that encounter).

Accordingly, Respondents preserve DHS's contrary statutory interpretation while recognizing that *da Cunha* likely controls here and this Court's decisions cited above will likely lead the Court to conclude that Petitioner's present detention is governed by § 1226(a).

If the Court concludes that Petitioner's detention is governed by § 1226(a), Respondents respectfully submit that the appropriate remedy is a prompt, individualized bond hearing before an Immigration Judge, rather than immediate release.

Section 1226(a) expressly authorizes the detention of a noncitizen pending a decision on removal and permits release on bond or conditional parole. 8 U.S.C. § 1226(a). The Supreme Court has recognized Congress's broad authority 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). At an ordinary custody redetermination proceeding under § 1226(a), the noncitizen bears the burden of establishing that release is warranted. *See Matter of Guerra*, 24 I. & N. Dec. 37, 40 (B.I.A. 2006); *Mahmodi v. Marich*, 2026 WL 113473, at *6–10.

Although due process may require additional procedural protections when detention under § 1226(a) becomes prolonged, Petitioner has been detained only since August 10, 2026. *See Velasco Lopez v. Decker*, 978 F.3d 842, 854–57 (2d Cir. 2020). Thus, this case does not present the prolonged detention that supported the heightened procedural protections imposed in *Velasco Lopez*. Rather, if the Court concludes that § 1226(a) governs Petitioner's detention, a prompt individualized bond hearing provides an appropriate means of addressing his custody while preserving the statutory framework Congress established.

At such a hearing, Petitioner may present evidence concerning his compliance with immigration requirements, family and community ties, immigration history, criminal history, and any other circumstances relevant to danger or flight risk. The Immigration Judge may then make the individualized custody determination contemplated by § 1226(a) and its implementing regulations. *See* 8 U.S.C. § 1226(a); 8 C.F.R. §§ 236.1(d), 1236.1(d). Immediate release would bypass that statutory framework and preclude the Immigration Judge from making the custody determination Congress entrusted to the Executive Branch. A prompt bond hearing would instead address any procedural deficiency while preserving the Government's authority to detain Petitioner if he fails to establish that release is warranted.

The Government does not consent to issuance of the writ, maintains that Petitioner's detention is authorized under § 1225(b), and reserves all rights, including the right to appeal. Respondents respectfully request that the Court deny the Petition to the extent it seeks Petitioner's immediate release. If the Court determines that Petitioner's detention is instead governed by § 1226(a),

Respondents request that the Court order a prompt, individualized bond hearing before an Immigration Judge, at which Petitioner shall bear the burden of demonstrating that he does not present a danger to the community or a risk of flight and that his release is otherwise warranted.

While Respondents maintain that immediate release is not warranted, if the Court orders Petitioner's release, Respondents respectfully request until 5:00 p.m. on the day following entry of such order to effectuate Petitioner's safe and orderly release. Respondents further respectfully request until 5:00 p.m. on the following business day to certify compliance, if such certification is required.

Finally, any application for attorney's fees under the Equal Access to Justice Act ("EAJA")[3] is premature. An EAJA application must be filed within thirty days of a final, non-appealable judgment. 28 U.S.C. § 2412(d)(1)(B), (d)(2)(G); *Melkonyan v. Sullivan*, 501 U.S. 89, 96 (1991). Because no final judgment has been entered, any request for attorney's fees should be denied without prejudice as premature. *See United States v. 27.09 Acres of Land*, 1 F.3d 107, 111 (2d Cir. 1993).

Respondents respectfully submit that the Court may resolve the Petition on the present record without further briefing or an evidentiary hearing. Should the Court determine that additional briefing or proceedings would assist its consideration, Respondents are prepared to comply with any further order.

Thank you for the Court's consideration of this matter.

Respectfully Submitted,

TODD BLANCHE
Attorney General

JOHN A. SARCONE III
First Assistant United States Attorney

[3] Moreover, any EAJA petition, should one be filed at the appropriate time, should be stayed pending the Supreme Court's resolution of *Montoya-Palacios v. Liggins*, No. 25-1223. On June 29, 2026, the Supreme Court granted certiorari in *Montoya-Palacios* to resolve whether EAJA's reference to "any civil action" encompasses an action seeking a writ of habeas corpus to challenge civil immigration detention. The case arises from the Fourth Circuit, where the court concluded that the petitioner was not entitled to attorney's fees under EAJA because habeas proceedings do not constitute "civil actions" for purposes of EAJA's limited waiver of sovereign immunity. The Supreme Court's resolution of that question may directly bear on whether attorney's fees are available under EAJA in this action. Accordingly, if Petitioner seek attorney's fees before the Supreme Court resolves *Montoya-Palacios*, Respondents respectfully reserve the right to request that any EAJA litigation be stayed pending the Supreme Court's decision.

By: *s/ Alexis M. Osborne*
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