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September 21, 2026

VIA CM/ECF
Hon. Brenda K. Sannes
Chief U.S. District Judge
Federal Building and U.S. Courthouse
P.O. Box 7336
Syracuse NY 13261-7336

RE: *Quishpe v. Venturella, et al*
Civil Action No. 9:26-cv-01748 (BKS)

Dear Judge Sannes:

This Office represents the Respondents (the "Government") in this habeas corpus action, in which Petitioner Carlos Tipan Quishpe ("Petitioner") challenges his detention by the U.S. Department of Homeland Security ("DHS"), including U.S. Immigration and Customs Enforcement ("ICE"). On September 15, 2026, Petitioner filed this Verified Petition for an Emergency Writ of Habeas Corpus Relief pursuant to 28 U.S.C. § 2241 ("Petition"). Dkt. No. 1. The Court thereafter ordered the Government to file a response by September 21, 2026. Dkt. No. 4.

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, to conserve judicial and party resources, and to 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.[1] On July 14, 2024, Petitioner presented himself at the Brownsville, Texas Port of Entry. *Id* at 2. According to the Form I-213 dated July 14, 2024, Petitioner was processed as an arriving alien and served on that same date with a Notice to Appear ("NTA"), placing him into removal proceedings. Exs. A, B. Petitioner was subsequently released from immigration custody pursuant to parole under 8 U.S.C. § 1182(d)(5)(A) with a termination date of April 24, 2026. Ex. A at 2, Ex. C. Petitioner's release on parole did not constitute an admission into the United States. *See* 8 U.S.C. § 1182(d)(5)(A).

On August 30, 2024, Petitioner submitted a Form I-765, Application for Employment Authorization, which was approved, and an employment authorization document was issued on that same date. Ex. D at 3. Subsequently, on February 19, 2025, the Petitioner filed a second Form

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

I-765, which was likewise approved, resulting in the issuance of an additional employment authorization document. *Id.*

On July 13, 2026, an Immigration Judge issued an order of removal against the Petitioner. Exs. D, E. On August 11, 2026, Petitioner timely filed a Notice of Appeal with the Board of Immigration Appeals seeking review of the Immigration Judge's removal order. Exs. D at 3, F. That appeal remains pending.

On September 15, 2026, Albany ICE Enforcement and Removal Operation ("ERO") officers attempted to apprehend the Petitioner during a targeted enforcement operation in Schenectady, New York. Ex. D at 2. As ERO officers attempted to conduct a vehicle stop of a gray Toyota RAV4 leaving the target residence, an unidentified individual fled from the vehicle and Petitioner briefly evaded arrest by entering a wooded area. *Id.* During this encounter, an ERO officer was injured while searching the wooded area. *Id.* After approximately 30 minutes, ERO officers observed the Petitioner enter an orange Dodge Ram 2500. Ex. D at 2. With assistance from local law enforcement, officers conducted a second vehicle stop of that vehicle. *Id.* Petitioner was identified and arrested at approximately 8:20 a.m. ICE issued an I-200 Warrant of Arrest of Alien at 8:25 a.m., which was served on Petitioner at 8:31 a.m. Exs. D at 2-3, G. Petitioner remains detained at the Buffalo Detention Center in Batavia, New York.

DHS maintains that Petitioner was subject to mandatory detention pursuant to 8 U.S.C. § 1225(b)(2)(A). *See Barbosa da Cunha v. Freden*, 175 F.4th 61 at *75 (2d Cir. 2026) ("Instead, Section 1225(b)(2)(A) applies to those noncitizens who present themselves at a port of entry for admission…."). *Seealso Losinskii v. Rhoney*, 26-cv-00351-JLS at * 5 (W.D.N.Y. May 19, 2026) ("For the reasons stated above, Petitioner is detained under 8 U.S.C. § 1225(b)(2)(A) and, therefore, is not entitled to a bond hearing."); *Lopez Cavajal v. Bausch*, 26-cv-00861-JLS at * 5 (W.D.N.Y. June 15, 2026) (same).

DHS maintains that *Barbosa da Cunha v. Freden*,[2] 175 F.4th 61 (2d Cir. 2026), does not govern cases where, as here, a noncitizen was apprehended at or near the time of entry, processed under § 1225(b), and subsequently released on parole under 8 U.S.C. § 1182(d)(5)(A). Such parole is temporary, subject to such conditions as DHS may prescribe, and "shall not be regarded as an

[2] On July 23, 2026, the Government filed a petition in the United States Supreme Court seeking a writ of certiorari from the Second Circuit's decision in *da Cunha*. *See Rhoney v. Barbosa da Cunha*, No. 26-104 (Sup. Ct. July 23, 2026). The petition asks the Supreme Court to resolve the issue 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. 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).

admission." Section 1182(d)(5)(A) further provides that, when the purposes of parole have been served, the noncitizen "shall forthwith return or be returned to the custody from which he was paroled," after which his case shall continue to be treated in the same manner as that of any other applicant for admission. Consistent with that statutory language, the Board of Immigration Appeals has held that a noncitizen released from detention under a grant of parole pursuant to § 1182(d)(5)(A), whose parole is later terminated, returns to custody under § 1225(b) pending completion of removal proceedings. *Matter of Q. Li*, 29 I. & N. Dec. 66, 69–70 (B.I.A. 2025) (citing 8 C.F.R. § 212.5(e)(2)(i)).

The government acknowledges, however, that although *Barbosa da Cunha* did not expressly address or reject *Matter of Q. Li*, a fair reading of the Second Circuit's decision appears to foreclose the interpretation adopted in *Q. Li* as applied to the circumstances presented here. In *da Cunha*, the Second Circuit held that § 1225(b)(2)(A) does not govern the detention of a noncitizen who entered the United States without inspection, was already present in the interior of the country, and was not apprehended while entering the country or shortly thereafter. *Id.* Rather, the court concluded that such a noncitizen's detention is governed by § 1226(a). *Id.*

Furthermore, other decisions from other courts within the Northern District of New York since *da Cunha* have rejected DHS' position. *See, e.g.*, *Ampuero v. Venturella*, No. 9:26-CV-1267 (MAD), 2026 WL 1983211 (N.D.N.Y. July 8, 2026), at *5–7 (rejecting the argument that a noncitizen who was apprehended at the border, subsequently paroled, and permitted to reside in the United States for several years remained subject to mandatory detention under § 1225(b)(2)(A)); *Hernandez Villasmil v. Blanche*, No. 9:26- CV-713 (MAD), 2026 WL 1235068, at *6 (N.D.N.Y. May 5, 2026) (holding that a petitioner who had been paroled into the United States and continued to reside here after the termination of his parole was no longer "seeking admission" and therefore was subject to § 1226(a)); *Torrez Arce v. Blanche*, No. 9:26-cv-00501 (ECC), 2026 WL 1430509, at *3–4 (N.D.N.Y. May 21, 2026) (concluding that a petitioner who had been paroled into the United States approximately two years before his arrest was not "seeking admission" when rearrested and therefore was not subject to § 1225(b)(2)(A)); *Rodriguez v. Venturella*, No. 9:26-cv-01440-AMN, at Dkt. #11 (N.D.N.Y. Aug. 11, 2026) (directing the immediate release of a petitioner who had previously been encountered by immigration authorities, released from custody pursuant to parole and ATD conditions, and subsequently re-detained when he appeared for an ATD appointment).

Respondents recognize that Petitioner remained at liberty before his re-detention. Courts within this District have concluded that, when a noncitizen previously released under § 1226(a) is later returned to custody, due process may require the Government to identify materially changed circumstances supporting that decision. *See Ampuero*, 2026 WL 1983211, at *7–8. Here, however, ICE did not treat Petitioner's prior release as a custody determination under § 1226(a). Petitioner had been released pursuant to DHS's parole authority under § 1182(d)(5)(A). ICE therefore treated his detention on September 15, 2026, as a return to custody following the termination of parole rather than as the revocation of a prior release determination under § 1226(a).

If the Court concludes that Petitioner's present detention is governed by § 1226(a), Respondents respectfully submit that the appropriate remedy is a prompt, individualized bond hearing before an Immigration Judge, not immediate release. At that hearing, Petitioner may present evidence concerning his compliance with any Alternatives to Detention requirements, his family and community ties, his immigration history, any criminal history, and any other circumstances relevant to whether he presents a danger to the community or a risk of flight. The Immigration Judge may then make the individualized custody determination contemplated by § 1226(a) and its implementing regulations.

The Supreme Court has recognized Congress's broad grant of 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). Courts within the Second Circuit have concluded that, at an initial bond hearing under 8 U.S.C. § 1226(a), the noncitizen bears the burden of establishing that release is warranted. *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 imposing that burden on a recently detained noncitizen is consistent with due process under *Mathews v. Eldridge*, 424 U.S. 319 (1976). *Id.* at *7–10.

That conclusion accords with the statutory framework recognized in *Jennings v. Rodriguez*, 583 U.S. 281 (2018). There, the Supreme Court rejected an interpretation 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 explained that § 1226(a) provides only that the Attorney General "may release" a noncitizen on bond and does not place the burden of proof on the Government. *Id.* The BIA likewise 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. 37, 40 (BIA 2006).

Immediate release would bypass that statutory framework and preclude the Immigration Judge from making the custody determination Congress entrusted to the Executive Branch. *See* 8 U.S.C. § 1226(a); 8 C.F.R. §§ 236.1(d), 1236.1(d). A prompt bond hearing would remedy any procedural deficiency the Court may find while preserving the Government's authority to detain Petitioner if he fails to establish that release is warranted.

Although due process may require additional procedural protections once detention becomes prolonged, *see Velasco Lopez v. Decker*, 978 F.3d 842, 854 (2d Cir. 2020), Petitioner had been detained for only a matter of hours at the time of this filing. Accordingly, neither § 1226(a) nor due process categorically places the burden of proof on the Government at an initial bond hearing. *See In re Guerra*, 24 I. & N. Dec. at 40. Nor has the Second Circuit held that due process requires the Government to bear that burden at every § 1226(a) bond hearing. Rather, whether due process requires a shifted burden depends on the circumstances of the particular detention, evaluated under the framework set forth in *Mathews*. *See Velasco Lopez*, 978 F.3d at 855 & n.13; *Mahmodi*, 2026 WL 113473, at *5–9.

While the Government maintains that Petitioner is not entitled to immediate release, should the Court grant such relief, Respondents respectfully request that they be afforded until 5:00 p.m. on the day following such order to effectuate Petitioner's safe and secure release. Further, should the Court require a report certifying compliance with any release order, Respondents respectfully request that they be permitted to submit such report by 5:00 p.m. on the business day following the release.

The Respondents further assert that, if the Court orders the Petitioner's immediate release, any limitation on the Government's authority to re-detain the Petitioner should not be conditioned on a pre-detention hearing—particularly in the absence of clarity regarding the mechanism and procedures for such a hearing or the tribunal before which it would occur. Under 8 C.F.R. § 1003.19(a), Immigration Judges may review custody only *after* ERO has already effectuated detention; no regulation, process, or procedure exists to provide a pre-detention hearing before re-detaining an individual who has been released, and ICE has no procedural mechanism to request or effectuate such a hearing. Moreover, the Petition does not request such relief.

Finally, any application for attorney's fees under the Equal Access to Justice Act ("EAJA") is premature.[3] An EAJA application must be filed within 30 days of a "final judgment," meaning a judgment that is final and no longer appealable. 28 U.S.C. § 2412(d)(1)(B), (d)(2)(G). That filing period does not begin until the time to appeal has expired. *See Melkonyan v. Sullivan*, 501 U.S. 89, 96 (1991). Because no final judgment has been entered in this matter, 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); *Barbour v. Colvin*, No. 12-CV-00548 ADS, 2013 WL 7206218, at *1 (E.D.N.Y. Aug. 1, 2013).

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

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[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.

briefing or proceedings would assist in its consideration of the Petition, Respondents are prepared to comply with any further order of the Court.

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

Respectfully Submitted,

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