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October 15, 2026

VIA CM/ECF
Hon. Anne M. Nardacci
U.S. District Judge
James T. Foley U.S. Courthouse
445 Broadway
Albany, NY 12207

RE: *Pereira Souza v. The Patrol Agent et. al.*
Civil Action No. 9:26-cv-2093 (AMN)

Dear Judge Nardacci:

This Office represents the Respondents (the "Government") in this habeas corpus action, in which Petitioner Edson Pereira Souza Junior ("Petitioner") challenges his detention by the U.S. Department of Homeland Security ("DHS"), including the Patrol Agent, of the Wellesley Island Border Station and U.S. Immigration and Customs Enforcement ("ICE"). On October 9, 2026, Petitioner filed this Petition for an Emergency Writ of Habeas Corpus Relief pursuant to 28 U.S.C. § 2241 ("Petition"). Dkt. 1. The Court thereafter ordered the Government to file a response by October 15, 2026. Dkt. 2.

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 Brazil who entered the United States at an unknown place and at an unknown time. Ex. A at 4.[1] DHS records do not reflect any prior immigration encounters of Petitioner by DHS immigration authorities. *Id.*

On October 4, 2026, United States Customs and Border Protection ("CBP") agents encountered Petitioner in Calcium, New York, after conducting a targeted enforcement operation, where CBP agents observed two male subjects enter a vehicle with New Jersey license plates and registered to a noncitizen of interest. Ex. A. CBP agents observed one of the males enter the vehicle and identified him as matching the physical description of the individual connected to the vehicle. *Id.*

[1] Exhibits "A" – "D" have been provided to undersigned counsel by CBP.

According to the Form I-213 prepared following the encounter, after the vehicle came to a stop, agents identified Petitioner as a passenger inside the vehicle, and conducted an immigration inspection. Ex. A at 2–3. During the inspection, Petitioner admitted to illegally entering the United States without inspection, confirming that he had never been detained or processed by immigration authorities before. *Id.* Immigration database checks confirmed that he lacked lawful status and was inadmissible under the Immigration and Nationality Act. *Id.* As a result, following the roadside inquiry, CBP arrested Petitioner. *Id.*

Shortly thereafter, Petitioner was transported without incident to Wellesley Border Patrol Station for administrative processing, where he was provided (i) a Form I-862, Notice to Appear; (ii) a Form I-200, Warrant for Arrest of Alien; and (iii) a Form I-286, Notice of Custody Determination. Exs. B, C, D. According to the Form I-286, Petitioner was notified that he could request a review of his custody determination, but he "refused to sign" the form and thus did not request a custody determination. *See* Ex. D. The Notice to Appear also states that he "refused to sign" it. Ex. B.

Petitioner argues only that his detention is unlawful because ICE unlawfully seized Petitioner and detained him under 8 U.S.C. § 1225 without the possibility of release on bond.[2] *See* Dkt. 1 at 1-2. That is factually inaccurate because (i) Respondents acknowledge that Petitioner is detained under § 1226(a); and (ii) Petitioner was afforded the opportunity to request a bond hearing, but he did not avail himself of it. Each of Petitioner's arguments are addressed, in turn, below.

As an initial matter, Respondents acknowledge that, under the Second Circuit's decision in *Barbosa da Cunha v. Freden*, 175 F.4th 61 (2d Cir. 2026), Petitioner's present detention is governed by 8 U.S.C. § 1226(a), which entitles Petitioner to a bond hearing. In *da Cunha*, the Second Circuit held that § 1225(b)(2)(A) does not govern the detention of a noncitizen who is already present in the interior of the United States and is not apprehended while entering the country or shortly thereafter. *Id.* Although the record here does not establish precisely when Petitioner entered the United States, it establishes that ICE encountered him in the interior of the United States and not while he was entering the country or shortly thereafter. Accordingly, *da Cunha* likely controls the statutory detention question presented here. On October 1, 2026, the Supreme Court granted the Government's petition for a writ of certiorari in *da Cunha*.[3] *See Rhoney*

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[2] *Conn. Bar Ass'n v. United States,* 620 F.3d 81, 91 n.13 (2d Cir. 2010) ("Issues raised for the first time in a reply brief are generally deemed waived.").

[3] On July 23, 2026, the Government filed a petition for a writ of certiorari seeking review of the Second Circuit's decision in *Barbosa da Cunha v. Freden*. *See Rhoney v. Barbosa da Cunha*, No. 26-104 (Sup. Ct. July 23, 2026). On September 25, 2026, the Second Circuit denied rehearing en banc, leaving the panel's decision in place. *See Barbosa da Cunha v. Freden*, No. 25-3141 (2d Cir. Sept. 25, 2026). On October 1, 2026, the Supreme Court granted certiorari. *See Rhoney v. Barbosa da Cunha*, No. 26-104 (Sup. Ct. Oct. 1, 2026).

v. Barbosa da Cunha, No. 26-104 (Sup. Ct. Oct. 1, 2026). Accordingly, the Government preserves all rights, including the right to appeal, with respect to the appropriate statutory authority governing Petitioner's detention.

In light of *da Cunha*, Petitioner was provided the process that is due under § 1226(a). He was served with a Notice to Appear in immigration court and was also provided a Form I-286 Notice of Custody Determination, which informed him of his right to request review of his custody determination by an Immigration Judge. See 8 C.F.R. §§ 236.1(d), 1003.19, 1236.1(d); Ex. D. Both the Notice to Appear and the Form I-286 Notice of Custody Determination reflect that Petitioner "refused to sign." Exs. B, D. By refusing to sign, Petitioner did not avail himself of the opportunity to request an individualized custody redetermination (i.e., a bond hearing), the same request he now seeks through the filing of a habeas. Should Petitioner request a bond hearing, one will be scheduled promptly.

Although § 2241 contains no statutory exhaustion requirement, courts within this Circuit generally require exhaustion of available administrative remedies as a prudential matter before an immigration detainee seeks habeas relief. *See Michalski v. Decker*, 279 F. Supp. 3d 487, 495–96 (S.D.N.Y. 2018); *Raspoutny v. Decker*, No. 23-CV-3823 (GWG), 2023 WL 6132700, at *3–4 (S.D.N.Y. Sept. 19, 2023). Where, as here, an Immigration Judge may provide the practical relief sought through a bond hearing, resort to that process in the first instance may render judicial intervention unnecessary. *See Michalski*, 279 F. Supp. 3d at 495–96. Accordingly, Petitioner's request for immediate release should be denied, and, at most, any relief should be limited to a prompt, individualized bond hearing before an Immigration Judge.

Nor should this Court shift the burden of proof to the Government at any bond hearing. Courts within the Second Circuit have held that the burden at an initial § 1226(a) bond hearing rests on the noncitizen. *See Mahmodi v. Marich*, No. 25-CV-6762-MAV, 2026 WL 113473 (W.D.N.Y. Jan. 15, 2026). This is consistent with *Jennings v. Rodriguez*, 583 U.S. 281, 301-03 (2018), which held that § 1226(a) does not require the Government to prove dangerousness or flight risk by clear and convincing evidence and does not mandate periodic bond hearings. *Id.* The BIA's longstanding rule is the same. *See In Re Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006).

However, should this Court find that there was a violation of Petitioner's due process rights, the Government acknowledges that courts in the Northern District of New York have routinely shifted the burden of proof to the Government at bond hearings, requiring the Government to establish dangerousness or flight risk by clear and convincing evidence. *See, e.g.*, *Quishpe v. Venturella*, No. 9:26-cv-01748-BKS (N.D.N.Y. October 8, 2026), Dkt. 9; *Maillazhungo Saeteros v. Warden*, No. 9:26-cv-01220-BKS (N.D.N.Y. June 17, 2026), Dkt. 6; *Beltran v. Lyons*, No. 9:26-cv-01526-

AJB (N.D.N.Y September 3, 2026), Dkt. 9. Although the Government continues to maintain that neither *Jennings* nor BIA precedent compels a burden-shifting bond hearing, it recognizes that this Court and others within this district have imposed such a requirement upon finding a due process violation.

Although due process may sometimes require additional safeguards once detention becomes prolonged, see *Velasco Lopez v. Decker*, 978 F.3d 842, 854 (2d Cir. 2020), Petitioner had been detained only for a matter of hours at the time of filing. Neither § 1226(a) nor due process requires shifting the burden of proof to the Government at an initial bond hearing. Whether such a shift is required depends on the circumstances under *Mathews v. Eldridge*, 424 U.S. 319 (1976). *See Velasco Lopez*, 978 F.3d at 855 & n.13; *Mahmodi*, 2026 WL 113473, at *5–9.

Although the Government maintains that Petitioner is not entitled to immediate release, should the Court grant such relief, Respondents respectfully request until 5:00 p.m. the following day to effectuate Petitioner's safe release. Should the Court require a compliance report, Respondents request until 5:00 p.m. on the next business day to submit it.

Respondents further assert that any limitation on the Government's ability to re-detain Petitioner should not be conditioned on a pre-detention hearing, for which no regulatory mechanism exists. Immigration Judges may review custody only after detention has occurred. *See* 8 C.F.R. § 1003.19(a). No process currently exists to obtain a pre-detention hearing.

Finally, any application for fees under the EAJA is premature. Such applications must be filed within 30 days of a "final judgment," meaning a judgment no longer appealable. 28 U.S.C. § 2412(d)(1)(B), (d)(2)(G). That period does not begin until the time to appeal has expired. *See Melkonyan v. Sullivan*, 501 U.S. 89, 96 (1991). No final judgment has been entered here, so any fee request 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. If the Court requires additional briefing or proceedings, Respondents will promptly comply.

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

Respectfully Submitted,

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