UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

WILSON FERNANDO PASATO ZHISHPON,

Petitioner,

v.

STEPHEN KURZDORFER, Field Office Director of Enforcement and Removal Operations, BUFFALO Field Office, Immigration and Customs Enforcement; Kristi NOEM, Secretary, U.S. Department of Homeland Security; U.S. DEPARTMENT OF HOMELAND SECURITY; Pamela BONDI, U.S. Attorney General; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; MICHAEL BALL, Warden of BUFFALO DETENTION FACILITY

Respondents.

Case No. 25-CV-06678-MAV

PETITIONER'S REPLY TO REPONSE TO ORDER TO SHOW CAUSE

Petitioner, WILSON FERNANDO PASATO ZHISHPON, is a civil immigration detainee, an asylum seeker from Ecuador who has lived in the United States. He is detained at the BUFFALO DETENTION FACILITY despite having no criminal convictions, a pending asylum application and ongoing removal proceedings with no final order. Such arrest and detention violate the Due Process Clause of the Fifth Amendment. Petitioner, through undersigned counsel, submits this reply brief.

I. RESPONDENTS CONCEDE THAT THIS CASE RISES OR FALLS WITH *DA CUNHA*

Habeas exists precisely so that similarly situated individuals are not subject to arbitrary, inconsistent detention based solely on which A-number or docket number is assigned. The Court should do what Respondents themselves say is appropriately its existing reasoning and grant the writ. Respondents expressly acknowledge that: "this Court's prior rulings concerning similar challenges to the government policy or practice at issue in this case, and the common question of law between this case and those rulings, would control the result in this case should the Court adhere to its legal reasoning in those prior decisions." They then "re-raise any and all jurisdictional defenses" and "rely upon and incorporate by reference the legal arguments [they] presented in *Da Cunha*," while urging the Court to "decide this matter without further briefing and without oral argument." *See, e.g., Da Cunha v. Freden*, 25-CV-06532-MAV, ECF No. 25 (W.D.N.Y. Oct. 20, 2025)

In other words, Respondents candidly admit: There is no material legal difference between this case and *Da Cunha*; They have nothing new to add beyond what the Court has already rejected; and If the Court "adhere[s] to its legal reasoning" in its prior rulings, Petitioner prevails.

II. PETITIONER'S DETENTION IS GOVERNED BY 8 U.S.C. § 1226(a), NOT § 1225(b)(2)

Respondents again assert that, because Petitioner entered without inspection, he "was and remains an applicant for admission" whose custody is governed by § 1225, not § 1226. They rest that claim almost entirely on *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025). This Court has already rejected that exact theory in *Da Cunha* and related cases. The Court held that DHS cannot transform long-term residents, arrested in the interior after years in the United States, into § 1225(b)(2) "arriving aliens" whose detention is mandatorily governed by § 1225, rather than § 1226(a). That conclusion is consistent with:

- The statutory structure distinguishing inspection at or near the border (§ 1225) from arrest and detention of noncitizens already present in the United States (§ 1226);
- The prior, decades-long practice of treating interior arrests of individuals who entered without inspection as governed by § 1226(a); and
- The growing line of district court cases (including within this Circuit) rejecting DHS's new, expansive reading of § 1225(b)(2).

Yajure Hurtado does not change that analysis. The Board's reading of § 1225(b)(2)(A) stretches a border-inspection provision to cover interior arrests and effectively grants DHS unilateral power to decide whether an individual is subject to mandatory detention or bond-eligible custody, simply by invoking § 1225 rather than § 1226. Courts in this Circuit, including this one, have already declined to defer to that interpretation where it conflicts with the statute, longstanding practice, and constitutional constraints.

For the same reasons the Court rejected the Government's § 1225(b)(2) theory in *Da Cunha*, the Court should hold here that Mr. Zhishpon is detained under § 1226(a) and is entitled to the protections that statute and the Due Process Clause require.

III. A POST-HOC BOND HEARING CANNOT CURE DETENTION THAT WAS UNLAWFUL FROM THE START

Respondents next contend that, even if the Court finds § 1226(a) controls, "the only appropriate remedy is a bond hearing before an immigration judge," with the burden on Petitioner. That argument ignores both the nature of the constitutional injury and the rapidly developing case law in this Circuit recognizing that a late bond hearing is not an adequate remedy where ICE detained someone under the wrong statute and ignored required procedures.

As the Eastern District of New York explained in *Rodriguez-Acurio v. Almodovar*: "a bond determination by a DHS officer or an immigration judge would not remedy the core constitutional violation at issue here. [Petitioner's] detention was unlawful from its inception because ICE detained her under the wrong statute and without any notice or opportunity to be heard, much less the procedures required under Section 1226(a)." 2025 WL 3314420, at *31 (E.D.N.Y. Nov. 28, 2025).

Many courts in this circuit have decided that when Section 1225(b)(2) is applied unlawfully, as it undisputedly was here, release is the most appropriate remedy—without first ordering a bond hearing. *See Montoya v. Bondi, et al.*, No. 25-CV-06363 (JMA), 2025 WL 3280762, at *1 (E.D.N.Y. Nov. 25, 2025); *Hyppolite v. Noem*, No. 25-cv-4304, 2025 WL 2829511 at *16 (E.D.N.Y. Oct. 6, 2025); *J.U. v. Maldonado*, No. 25-CV-04836 (OEM), 2025 WL 2772765 (E.D.N.Y. Sept. 29, 2025), at *10; *Artiga v. Genalo*, No. 25-CV-5208 (OEM), 2025 WL 2829434, at *9 (E.D.N.Y. Oct. 5, 2025) ("Petitioner's allegations of his detention by ICE raise a substantial constitutional question that cannot be properly adjudicated administratively").

And, in *Gonzalez v. Joyce*, Judge Torres warned that allowing ICE to detain first and justify later would: "offend[] the ordered system of liberty that is the pillar of the Fifth

Amendment." 2025 WL 2961626, at *7 (S.D.N.Y. Oct. 19, 2025). Those cases—and others cited in Petitioner's prior briefing—squarely reject the Government's suggestion that any constitutional problem can be cured simply by holding a bond hearing at some later date, under the wrong burden, after weeks of unlawful detention. The core injury here is being detained at all under an inapplicable statute without the process § 1226(a) requires. That has already happened and cannot be undone by a belated bond proceeding.

Accordingly, the appropriate remedy is release, as courts in this Circuit have already ordered in similar misclassification cases.

IV. EXHAUSTION IS NOT REQUIRED AND WOULD BE FUTILE

The Second Circuit has long recognized that exhaustion is not required. *Howell v. INS*, 72 F.3d 288, 291 (2d Cir. 1995). Respondents' insistence that Petitioner must first pursue a bond hearing before an immigration judge essentially attempts to impose a prudential exhaustion requirement. The Second Circuit has held that exhaustion is not required when (1) available remedies provide no genuine opportunity for adequate relief; (2) irreparable injury may occur without immediate judicial relief; (3) administrative appeal would be futile; or (4) the petitioner raises substantial constitutional questions. *Howell v. INS*, 72 F.3d 288, 291 (2d Cir. 1995).

All four factors apply here:

1. **No adequate relief**: A bond hearing cannot retroactively cure unlawful detention under the wrong statute. *Rodriguez-Acurio*, 2025 WL 3314420, at *31*.
2. **Irreparable injury**: Ongoing detention in violation of due process is itself irreparable harm. *J.U.*, 2025 WL 2772765, at *4*.

3. **Futility**: DHS and EOIR have been directed to treat similarly situated individuals as detained under § 1225(b), denying bond jurisdiction entirely. Bond review in that posture is illusory. *Howell v. INS*, 72 F.3d 288, 291 (2d Cir. 1995).
4. **Constitutional question**: Petitioner challenges the legality of his detention under the Fifth Amendment and the proper interpretation of the detention statutes—precisely the kind of question appropriate for habeas review without exhaustion. *Id.*

Requiring Petitioner to first seek relief from the very system that has misclassified him and disclaimed bond jurisdiction would "grant practically limitless, unreviewable power to detain individuals for weeks or months, even if the detention is patently unconstitutional." *Ozturk v. Trump*, 2025 WL 1145250, at *14–15 (D. Vt. Apr. 18, 2025), amended sub nom. *Ozturk v. Hyde*, 136 F.4th 382 (2d Cir. 2025).

V. A LIMITED NO-TRANSFER ORDER IS APPROPRIATE TO PROTECT THIS COURT'S JURISDICTION AND PETITIONER'S RIGHTS

Petitioner does not seek to strip DHS of its general authority to manage detention facilities. However, Respondents argue that the Court should deny Petitioner's request to enjoin transfer outside the Western District of New York, citing ICE's statutory authority to "arrange for appropriate places of detention" under 8 U.S.C. § 1231(g)(1) and district court cases declining to interfere with transfer. This argument is futile as Petitioner seeks a narrow, time-limited order preserving the status quo while this Court adjudicates his habeas petition.

Here:

- Jurisdiction has attached;
- The Court has already recognized that common questions of law connect this case to others previously litigated in this District; and

- A long-distance transfer would significantly impede Petitioner's ability to consult with undersigned counsel and prepare evidence in support of release.

A limited no-transfer order ensures that this Court's eventual decision—whether it orders release or a bond hearing—is not rendered hollow by the Government unilaterally moving Petitioner to a distant facility before the Court can act.

IV. CONCLUSION

Respondents chose to file a short submission that provides no new fact or law that would justify treating Mr. Pasato Zhishpon differently from similarly situated petitioners this Court has already found unlawfully detained.

For the reasons above and those in the Petition and prior filings, Petitioner respectfully requests that the Court:

1. Grant the Petition and order his immediate release;
2. In the alternative, order his release on conditions set by this Court, rather than a belated bond hearing; and
3. Other just relief as the Court deems necessary.

DATED: December 3, 2025

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