

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
DIVISION OF ROCHESTER**

ABDULLAH MAHMODI

and

HUSSAIN HUSSAINI,

Petitioners,

v.

TAMMY MARICH, in her official capacity
as Field Office Director, Buffalo Field Office,
Enforcement and Removal Operations, U.S.
Immigration and Customs Enforcement; et al.,

Respondents

Case no:25-CV-06762-MAV

PETITIONERS' REPLY TO OPPOSITION

Petitioners Abdullah Mahmodi and Hussain Hussaini, through their undersigned counsel, respectfully submit this reply to Respondents' opposition to the Court's Order to Show Cause, dated December 22, 2025.

INTRODUCTION

Petitioners filed a petition for a writ of habeas corpus on December 12, 2025. On December 17, this Court issued an Order to Show Cause, requiring Respondents to show cause within fourteen days why the petition should not be granted in light of the Court's prior orders, including its decision in *Da Cunha v. Freden*, No. 25-CV-6532-MAV, 2025 WL 3280575 (W.D.N.Y. Nov. 25, 2025).

In their response submitted on December 22, 2025, Respondents conceded that if the Court adheres to the reasoning in its prior rulings, Petitioners are entitled to a bond hearing. ECF

No. 4 at 1-2. Respondents requested that the Petitioners have the burden to establish that they are not a flight risk or a danger to society if the Court orders a bond hearing. ECF No. 4 at 4. For the reasons explained below, Petitioners request that the Court order a constitutionally adequate bond hearing, i.e. a bond hearing where Respondents bear the burden of proving dangerousness or flight risk by clear and convincing evidence.

DUE PROCESS REQUIRES THAT THE BURDEN BE ON THE GOVERNMENT TO JUSTIFY DEPRIVING PETITIONERS OF THEIR LIBERTY

The Due Process clause of the Fifth Amendment “requires the Government to bear the burden of proving, by clear and convincing evidence, that the noncitizen poses a risk of flight or danger to the community.” *B.S. v. Joyce*, 2023 U.S. Dist. LEXIS 24235 (S.D.N.Y. Feb. 13, 2023) (citing *Quintanilla v. Decker*, 21-Civ-417, 2021 U.S. Dist. LEXIS 32633, 2021WL 707062, at *3 (S.D.N.Y. Feb. 22, 2021)).

Respondents cite *Jennings v. Rodriguez*, 583 U.S. 281 (2018) in arguing that the noncitizen should bear the burden of proof in any bond hearing under Section 1226(a). In *Jennings*, the Ninth Circuit had ordered the government to provide periodic bond hearings every six months, where the government would bear the burden of showing the need for continued detention by clear and convincing evidence. *Jennings*, 583 U.S. at 306. The Supreme Court reversed, holding that “nothing in 1226(a)’s text . . . supports the imposition of either of those requirements.” *Id.* It is true that the text of 1226(a) does not place the burden on the government. However, the government’s application of any statute remains subject to the Constitution. *Velasco Lopez v. Decker*, 978 F.3d 842, 850 (“Whether [a detained noncitizen] received the due process to which he was entitled ‘is not a matter of discretion’ and is subject to judicial review”) (citing *Zadvydas*, 533 U.S. 678, 688 (2001)). Thus, even though, as respondents note, the applicable statutes give the Attorney General the right to detain or release a noncitizen, the

Attorney General's discretion cannot extend beyond constitutional limits. The ultimate issue in *Jennings* was whether due process required periodic bond hearings to be afforded to noncitizens in detention. *Jennings*, 583 U.S. at 286. *Jennings* did not actually directly consider the allocation of the burden in cases where a bond hearing is required, and its holding is not relevant to this issue. *Id.* The Second Circuit found as much in *Velasco Lopez v. Decker*, noting that *Jennings* expressly declined to reach constitutional issues. 978 F.3d 842, 857 (2d Cir. 2020).

Respondents further argue that there is no due process right to shift the burden to the government under *Velasco Lopez v. Decker*. 978 F.3d 842. It is true that the Second Circuit in *Velasco Lopez* did not hold generally that due process required the burden to be on the government for all bond hearings under Section 1226(a). *Id.* However, the Second Circuit also did not hold generally that placing the burden on the noncitizen comported with due process. *Id.* The Second Circuit simply declined to reach the general issue, finding that in the case before it, due process did require the government to bear the burden of proof given the prolonged detention at issue. *Id.* at 855 n.13.

Thereafter, numerous district courts have acknowledged *Velasco Lopez* and continued to hold that for those detained under Section 1226(a), the constitution requires that the burden be on the government to prove by clear and convincing evidence that the detained individual is a flight risk or a danger to the community. *See, e.g. B.S. v. Joyce*, 2023 U.S. Dist. LEXIS 24235 at *10 (S.D.N.Y Feb. 13, 2023) (collecting cases). Placing the burden on [a noncitizen] at his initial bond hearing to prove that he [is] not a flight risk or a danger to the community violate[s] his due process rights. *Id.* at 11. "Neither the Circuit's decision in *Velasco Lopez* nor any other binding appellate authority overrules the 'overwhelming consensus' of courts in this District that the Due Process Clause of the Fifth Amendment requires the Government to bear the burden to justify

continued detention of a noncitizen who is detained pursuant to 1226(a), *even absent 'prolonged detention.'*” *Banegas v. Decker*, 2021 U.S. Dist. LEXIS 88805 (S.D.N.Y. May 7, 2021) (*emphasis added*). “Numerous district courts in the Second Circuit . . . have consistently [held] that where, as here, the Government seeks to detain a noncitizen pending removal pursuant to § 1226(a), the Fifth Amendment Due Process Clause requires the Government to bear the burden of proving, by clear and convincing evidence, that such detention is justified.” *Id.* at *5 (collecting cases.)

Not only must the government bear the burden, but it must meet the standard of clear and convincing evidence in order to prevail. *See Velasco Lopez*, 978 F.3d at 856 (“The Supreme Court has consistently held the Government to a standard of proof higher than a preponderance of the evidence where liberty is at stake.”) (citing *Addington v. Texas*, 441 U.S. 418, 423 (1979)). Where the potential injury as significant as an individual’s liberty is at stake, it is “improper to allocate the risk of error evenly between the individual and the Government.” *Velasco Lopez*, 978 F.3d at 856.

**WHERE THE PETITIONERS’ LIBERTY IS AT STAKE, EXPEDITIOUS
RESOLUTION SHOULD BE REQUIRED**

Respondents request that if a bond hearing is required, that they should be given 14 days to comply, citing upcoming holidays. However, while a speedy resolution may cause some inconvenience, the liberty interests of the Petitioners are at stake. Because their detention without bond was a violation of their due process rights; there is an urgent interest in correcting that violation expeditiously. It is not in the interests of the Government, of Petitioners, or of the public to continue to incarcerate those who cannot be shown to be either a flight risk or a danger to the community. *Velasco Lopez v. Decker*, 978 F.3d at 842. Petitioners therefore request that the Court order a bond hearing within 7 days.

Dated: December 29, 2025

Albany, New York

Respectfully submitted,

/s/ Lauren DesRosiers

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CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2025, I electronically filed the foregoing Petitioner's Reply to Opposition with the clerk of the District Court using its CM/ECF system, which would then electronically notify the Respondents in this case.

December 29, 2025.

/s/ Lauren DesRosiers

Lauren DesRosiers

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Attorney for Petitioners