UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 26-cv-00610-CNS

IRFAN HOTAK,

Plaintiff-Petitioner,

v.

JUAN BALTAZAR, Warden, Denver Contract Detention Facility, Aurora, Colorado, in his official capacity,
GEORGE VALDEZ, Director of the Denver Field Office for U.S. Immigration and Customs Enforcement, in his official capacity;
KRISTI NOEM, Secretary of the U.S. Department of Homeland Security, in her official capacity;
TODD LYONS, Acting Director of U.S. Immigration and Customs Enforcement, in his official capacity;
PAMELA BONDI, Attorney General of the United States, in her official capacity;

Defendants-Respondents.

PETITIONER-PLAINTIFF'S REPLY TO RESPONDENT-DEFENDANTS' RESPONSE (ECF 12)

I. Introduction

The dispositive question before this Court is not new. Defendants- Respondents' ("Defendants") erroneously claim that their authority to jail Plaintiff- Petitioner ("Mr. Hotak") is pursuant to 8 U.S.C. § 1225(b)(2) because he entered the United States without inspection ("EWI") years ago. *See generally* ECF 12; ECF 12-1. This Court already held many times over that Defendant's position is wrong. *E.g.*, *Singh v. Baltazar*, ---F.Supp.3d---, 2026 WL 352870 (D.Colo. Feb. 9, 2026); *Rico v. Baltazar*, No. 1:25-cv-03943-CNS, 2025 WL 3640366 (D. Colo. Dec. 16, 20205); *Hernandez v. Baltazar et al.*, No. 1:25-cv-03094-CNS, 2026 WL 2996643 (D. Colo. Oct. 24, 2025). In fact, Chief Judge Brimmer acknowledged that Defendants' position "has been rejected in more than 1,500 district court decisions." *Chavez Amrenta v. Noem,* No. 26-cv-00236-PAB, 2026 WL 274634, at *2 (D. Colo. Feb. 3, 2026).

Defendants concede that the dispositive issue here ""is not materially different from an issue this Court has resolved in rulings in similar cases." ECF 12, at *2. Defendants provide no new or convincing argument for this Court to change course. This Court should grant Mr. Hotak's petition forthwith and order his immediate release.

II. Plaintiff's Incarceration is Pursuant to § 1226.

"Where, as here, a party files a response to a motion but does not address all arguments which the motion raises, the party has effectively conceded the arguments which it does not address." *Alfaro Herrera v. Baltazar*, 1:25-cv-04014-CNS, 2026 WL 91470, at *5 (D. Colo. Jan. 13, 2026) (citation omitted); *See United States v. Hunter*, 739 F.3d 482, 495 (10th Cir. 2013) (concluding that cursory argument not meaningfully developed by any analysis or citation is deemed waived). Mr. Hotak does not concede

that Defendants' attachment of a response in a different case sufficiently addresses Mr. Hotak's arguments.[1] To the extent the Court finds that it does, then what is good for the goose is good for the gander; attached hereto as Exhibit 1 are the relevant replies in *Mendoza Gutierrez v. Baltazar*, No. 25-cv-02720-RMR, 2025 WL 2962908 (D. Colo.), *appeal docketed*, No. 25-1460 (10th Cir. Dec. 15, 2025). As Judge Rodriguez decided in *Mendoza Gutierrez*, Defendants' position regarding which statute applies to people like Mr. Hotak is erroneous. *See Mendoza Guiterrez v. Baltasar*, No. 25-cv-2720-RMR, 2025 WL 2962908 (D. Colo. Oct. 17, 2025). This Court agrees. *E.g.*, *Singh v. Baltazar*, 2026 WL 352870.

Defendants also unconvincingly and without analysis cite the Fifth Circuit's decision in *Buenrostro-Mendez v. Bondi*,--- F.4th ---, 2026 WL 323330 (5th Cir. Feb. 6, 2026). ECF 12, at *2. As Judge Crews concluded, this Court already "surgically dismantle[d] the Fifth Circuit's reasoning" in *Buenrostro-Mendez*. *Marrero Yera v. Baltazar*, 1:26-cv-00476-SKC-SBP, 2026 WL 472014, at *2 (D. Colo. Feb. 19, 2026) (citing *Singh*, 2026 WL 352780, at **3–6). Once again, Defendants do not provide argument in support of its request that this Court deviate from its prior ruling. *See generally* ECF 12. The Court should not.

Defendants' response also "twist[s] the Supreme Court's decision in *Jennings*" to support their erroneous position. *Espinoza Ruiz v. Baltazar*, No. 1:25-cv-3294762, 2025 WL 3294762, at *2 (D. Colo. Nov. 26, 2025). Courts in this District have repeatedly found Defendants' analysis of *Jennings* incorrect. *E.g.*, *Martinez v. Baltazar*, 26-cv-00106-PAB,

[1] This Court already said it best: "Respondents' submission of an additional 30-page brief (on top of its five-page response) does not help to conserve judicial resources and is otherwise unpersuasive for the same reasons explained herein." *Singh*, 2026 WL 352870, at *1 n.1.

2026 WL 194163, at *3 (D. Colo. Jan. 26, 2026). Indeed, this Court has as well. *E.g.*, *Singh*, 2026 WL 352870, at *5.

Defendants do not present any meaningful challenge to this Court's previous rulings finding their interpretation of §§ 1225(b)(2) and 1226(a) erroneous. The Court should therefore rule in Mr. Hotak's favor and grant his Petition expeditiously.

III. Defendants Implicitly Concede that Mr. Hotak was Unlawfully Redetained.

ICE released Mr. Hotak on his own recognizance almost three years ago. ECF 2-1. To do so, ICE found that Mr. Hotak is neither a risk of flight nor a danger to the community. *See Saravia v. Sessions*, 280 F.Supp.3d 1168, 1176 (N.D. Cal. 2025) ("Release reflects a determination by the government that the noncitizen is not a danger to the community or a flight risk"). Defendants "do not contend that those facts have changed or otherwise argue that [Mr. Hotak] presents a flight risk or a danger to the community such that his continued detention is justified. Instead, [Defendants] simply argue that [Mr. Hotak's] detention is authorized by statute . . . ." *Alfaro Herrera*, 2026 WL 91470. This District has unanimously decided that Defendants' statutory interpretation is incorrect, Exh. 2-2, and "more than 1,500 district courts" across the country have done the same, *Chavez Amrenta*, 2026 WL 274634, at *2.

Under the circumstances, "Respondents' ongoing detention of [Mr. Hotak] with no process at all, much less prior notice, no showing of changed circumstances, or an opportunity to respond, violates his due process rights." *J.U. v. Maldonado*, 805 F.Supp.3d 482, 498 (E.D.N.Y. 2025). Indeed, Defendants' seemingly "ignore[] that [Mr. Hotak] was previously found not to be a flight risk or a danger to the community when he was released . . . ." *Alfaro Herrera*, 2026 WL 91470, at *13. "Given the deprivation of [Mr.

Hotak's] liberty, formerly granted and approved by Respondent, the absence of any deliberative process prior to or contemporaneous with the deprivation, and the statutory and constitutional rights implicated" this Court should order Respondents to "immediately release [Mr. Hotak] from custody." *J.U.*, 805 F.Supp.3d at 498; *See Valera v. Baltazar*, 1:25-cv-03744-CNS, 2025 WL 3496174, at *3 (D. Colo. Dec. 5, 2025) ("In this situation, ordering [Defendants] to provide Petitioner with a bond hearing would not address Petitioner's injury because, until then, he would remain in continued detention despite a determination from [ICE] that already ordered his release . . .").

Like this Court did in *Alfaro Herrera* and *Valera*, this Court should order Mr. Hotak's immediate release. As discussed in Mr. Hotak's Petition (ECF 1) and Motion for Temporary Restraining Order (ECF 2), Mr. Hotak is entitled to procedural due process. ECF 1, at ¶¶ 41–45; ECF 2, at **15–10. Defendants concede as much. *See Alfaro Herrera*, 2026 WL 91470, at *5. They did not argue otherwise or present any evidence or argument explaining why ICE reincarcerated Mr. Hotak without notice, an opportunity to be heard, or any material changed circumstances after releasing him years ago. *See generally* ECF 12; ECF 15-2. Immediate release from all forms of ICE custody is therefore the appropriate remedy. *See J.U.*, 805 F.Supp.3d at 498.

IV. The Appropriate Remedy is More than a § 1226(a) Bond Hearing

Under the circumstances "detention without a bond hearing amounts to a due process violation." *Garcia Cortes v. Noem*, 1:25-cv-02677-CNS, 2025 WL 2652880, at *4 (D. Colo. Sept. 16, 2025). Immediate release is the appropriate remedy in these circumstances. If this Court were to order a § 1226(a) bond hearing instead of release, due process requires specific remedies to address Defendants' lawlessness.

a. Immediate Release is the Appropriate Remedy because Defendants have Not Provided a Valid Basis for Mr. Hotak's Incarceration.

The appropriate remedy here is immediate release. This Court ordered a petitioner under similar facts immediately released because Defendants "ignore[] that [Mr. Hotak] was previously found not to be a flight risk or a danger to the community when he was released [on ROR]." *Alfaro Herrera*, 2026 WL 91470, at *13. There like here, Defendants "violations of [Mr. Hotak's] rights are best remedied by ordering [his] immediate release from immigration detention." *Id.*

Moreover, Defendants "had an opportunity in their papers to argue in the alternative that [Mr. Hotak] was subject to detention under § 1226 or provide some evidence that a warrant for his arrest had been issued." *Lopez de Leon v. Baltazar et al.*, 1:26-cv-00555-SKC-SBP, ECF 17, at *5 (D. Colo. Feb. 20, 2026) (attached as Exh. 2). They did not, and this Court should therefore order immediate release because "[f]orcing a detainee to wait for a hearing for days or weeks more in custody—under who knows what conditions—when he is not lawfully detained in the first place would gut the purpose of habeas review." *Id.* (quotation and citation omitted).

Indeed, Defendants must "defend [their] actions *based on the reasons it gave* when it acted . . . ." *DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 24 (2020) (emphasis added); *Marrero Yera*, 2026 WL 472014, at *2. Defendants have repeatedly—in its actions and in its briefing—maintained that its authority to jail Mr. Hotak is pursuant to § 1225(b)(2). As the Supreme Court in *Regents* made clear, Defendants must defend their actions based on the reason they give. *Id.* Defendants provide no reason for Mr. Hotak's continued incarceration beyond its erroneous interpretation of the statute. This Court should order ICE to immediate release Mr. Hotak. *Lopez de Leon*, 1:26-cv-00555-SKC-

SBP, ECF 17, at *5.

b. Assuming, *arguendo*, this Court Does Not Order Immediate Release, the Forthcoming Bond Hearing Must Include Procedural Protections.

This court already held that due process requires the government to carry a clear and convincing evidence burden in § 1226(a) bond hearings. *Alfaro Herrera*, 2026 WL 91470, at *12. Courts across the country now consider that the norm. *See Gomez v. Olson*, 25-cv-15300, 2025 WL 3768242, *6 (N.D. Ill. Dec. 31, 2025) (noting the "overwhelming consensus" that the burden in a court-ordered bonded hearing should be placed on the government). That is also true in this District. *E.g.*, *LG v. Choate*, 744 F.Supp.3d. 1172, 1186 (D. Colo. 2024); *Vences Nunez v. Baltazar*, 25-cv-04046-RBJ, ECR No. 10 (D. Colo. Jan. 16, 2026).

"Although the Tenth Circuit has not opined on whether the burden" in these circumstances should be on the government, this Court should agree "with other courts in this district, as well as other circuit courts nationwide, that allocating the burden to a noncitizen to prove that he should be released on bond under § 1226(a) violates due process as it assigns the risk of error to the party with the greater interest in their individual liberty as balanced against the Government's interests." *Alfaro Herrera*, 2026 WL 91470, at *10 (citation and quotation omitted).

Indeed, as this Court in *Alfaro Herrera* meticulously details, procedural due process requires the government to carry a clear and convincing evidence burden in § 1226(a) bond hearings. *Id.* at **10–12. At the outset, two threshold and commonsense considerations support that conclusion. First, "requiring a noncitizen to prove that they are *not* a flight risk and *not* a danger to the community is an inherently more difficult burden to meet than proving the affirmative because, as a practical matter, it is never

easy to prove a negative." *Alfaro Herrera*, 2026 WL 91470, at * 10 (quoting *Elkins v. United States*, 364 U.S. 206, 218 (1960) (emphasis in original)). On the other hand, "the government is far better positioned to prove their case than a detained noncitizen given that there is no right to counsel . . . and that by virtue of their detention, [they have] 'little ability to collect evidence.'" *Id.* (quoting *Moncrieffe v. Holder*, 569 U.S. 184, 1 (2013)). The government has "substantial resources to deploy" and shifting the burden to the government for it to utilize those resources reduces the risk of erroneously depriving a noncitizen of liberty. *Id.* (quotation omitted). Second, "placing the burden on the government is consistent with Supreme Court decisions that have repeatedly held that the government must bear a high burden of proof to justify its interest in [a] person's continued civil detention." *Id.* (citations omitted).

Turning to the *Mathews* factors, each weighs heavily in Mr. Hotak's favor. First, the private liberty interest at stake is the most significant liberty interest there is, the interest in being free from imprisonment. *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004). "Freedom from bodily restrain has always been at the core of the liberty protected by the Due Process Clause from arbitrary government action." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). "Even those who face significant constraints on their liberty or those over whose liberty the government wields significant discretion retain a protected interest in their liberty." *Rosado v. Figueroa*, CV 25-02157 PHX DLR (CDB), 2025 WL 2337099 at *11 (D. Ariz. Aug. 11, 2025); *Guillermo M.R. v. Kaiser*, 791 F.Supp.3d 1021, 1030 (N.D. Ca. Jul. 17, 2025) (citations omitted) (same). "When assessing this factor, courts consider the conditions under which detainees are currently held, including whether a detainee is held in conditions indistinguishable from criminal incarceration." *Rosado*, 2025 WL 2337099,

at *13. Courts in this district have repeatedly found that the Aurora Facility "strongly resemble[s] penal confinement" and that the conditions there "are abhorrent." *Arosteguí-Maldonado v. Baltazar*, 794 F.Supp.3d 926, 940 (D. Colo. 2025). This factor weighs heavily in Mr. Hotak's favor

Second, "the risk of erroneous deprivation of [Mr. Hotak's liberty interest] through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards also weighs in [Mr Hotak's] favor." *Alfaro Herrera*, 2026 WL 91470, at *11 (quotation omitted and cleaned up). As discussed *supra*, the government has "extensive resources and expertise in immigration law, is better equipped to properly collect and present evidence . . . ." *Id.* And again, proving a negative is inherently "never easy." *Elkins*, 364 U.S. at 218. This factor too weighs in Mr. Hotak's favor.

Finally, the Government has no interest in jailing people "who are neither dangerous nor a risk of flight." *Alfaro Herrera*, 2026 WL 91470, at *11. In fact, "shifting the burden of proof to the Government to justify continue detention promotes the Government's interest . . . in minimizing the enormous impact of incarceration in cases where it serves no purpose." *Id.* (quotation omitted).

In sum, due process requires the government to carry a clear and convincing evidence in any § 1226(a) bond hearing. *Id.* at 12; *L.G.*, 744 F.Supp.3d at 1186; *Mendoza Gutierrez*, 2025 WL 2962908 at *10. It also requires the neutral adjudicator to consider the noncitizen's ability to pay, otherwise the setting of bond would be untethered from its sole purpose—to secure the noncitizen's presence at future obligations. *U.S. v. Salerno*, 481 U.S. 739, 754 (1987) ("bail must be set by a court at a sum designed to [prevent flight] and no more") (citation omitted); *Hernandez v. Sessions*, 872 F.3d 976, 991 & n.4

(9th Cir. 2017) ("a bond determination that does not include consideration of financial circumstances and alternative release conditions is unlikely to result in a bond amount that is reasonably related to the government's legitimate interests"); *Hernandez, et.al. v. Garland et.al.*, No. EDCV 16-620 JGB (KKx), 2022 WL 1176752 (C.D. Cal. Mar. 28, 2022) (settlement agreement delineating that DHS must consider financial circumstances and ability to pay bond); *Sheikh v. Choate*, 1:22-cv-01627-RMR, 2022 WL 17075894, * 5 (D. Colo. Jul. 27, 2022) (grant of habeas corpus ordering a bond hearing at which IJ must consider ability to pay); *Viruel Arias v. Choate*, 1:22-cv-02238-CNS, 2022 WL 4467245, *5 (D. Colo. Sept. 26, 2022) (ordering the IJ to "meaningfully consider alternatives to imprisonment such as community-based alternatives to detention including release, parole, as well as petitioner's ability to pay a bond"); *Lopez-Romero v. Lyons*, 2:25-cv-01113, 2026 WL 92873, *7 (D.N.M. Jan. 13, 2026) (same). Senior Judge Jackson recently ordered the same. *Castillo Cabral v. Baltazar, et al.*, 1:26-cv-00418-RBJ, ECF 14 (D. Colo. Feb. 19, 2026) (attached as Exh. 3).

In *Castillo Cabral,* Judge Jackson also enjoined Defendants' from imposing additional restrictions on liberty not ordered by the IJ and from invoking the automatic stay on the grounds that it is appealing a grant of bond. *Id.* at *14. These remedies are necessary and sensical. In fact, Courts in this District find the automatic stay violative of procedural due process, *Balderas Rivas v. Baltazar, et al.*, 1:26-cv-00442-SCK, 2026 WL 444732, at *4 (D. Colo. Feb. 17, 2026); *Merchan-Pacheo v. Noem*, 1:25-cv-03860, SBP, 2026 WL 88526, (D. Colo. Jan. 12, 2026), and have enjoined Defendants from imposing an ankle monitor or other conditions not specifically imposed by an IJ, *Balderas Rivas*< 2026 WL 444732 at *4.. And in *Lopez de Leon*, the Court permanently enjoined

Defendants from re-detaining Mr. Lopez de Leon under the government's misapplication of § 1225(b)(2). *Lopez de Leon*, 1:26-cv-00555-SKC-SBP, at *6.

Defendants do not provide a compelling reason for this Court to deviate from these persuasive and compelling rulings. Doing so would permit ICE to circumvent this Court's consistent findings that their actions are unlawful. Despite its best efforts, "ICE is not a law unto itself." *Juan T.R. v. Noem*, 26-cv-01017 (PJS/DLM), 2026 WL 232015, at *1 (D. Minn. Jan. 28, 2026). Respectfully, this Court must unfortunately remind ICE of that again.

V. Conclusion

Based on the foregoing, this Court should grant Mr. Hotak's petition and order ICE to immediately release him from all forms of custody. Alternatively, the Court should order a bond hearing at which the government must carry a clear and convincing evidence burden to establish that continued detention is necessary where the IJ must consider his ability to pay.

Dated: February 25, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2026, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notifications of such filing to all counsel of record.

/s/ Conor T. Gleason
Conor T. Gleason