UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

NADEEM HASSAN,

Petitioner,

v.

PAMELA BONDI, in her official capacity as Attorney General; PHILIP RHONEY, in his official capacity as Deputy Field Office Director, Buffalo Field Office, U.S. Immigration & Customs Enforcement; TAMMY MARICH, in her official capacity as Field Office Director, Buffalo Field Office, U.S. Immigration & Customs Enforcement; TODD LYONS, in his official capacity as Acting Director, U.S. Immigration and Customs Enforcement; and KRISTI NOEM, in her official capacity as Secretary of Homeland Security,

Respondents.

Civil Action No.: 9:26-cv-000319 (BKS)

RESPONDENTS' RESPONSE TO PETITION PURSUANT TO ORDER TO SHOW CAUSE

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TABLE OF CONTENTS

Table Of Authorities ii

Preliminary Statement 1

Factual Background 4

Standard of Review 6

Argument 6

I. 8 U.S.C. § 1225(b)(2)(A) Governs Petitioner's Detention. 6

II. No Relief Should be Granted, but if this Court Grants Relief, then a Bond Hearing as Opposed to Immediate Release Should be Ordered. 8

A. Section 1225(b)(2)(A) Governs Petitioner's Detention, Therefore Petitioner is Not Entitled to a Bond Hearing Pursuant to the Statute, but if the Court Finds Due Process Requires More, then a Bond Hearing is the Appropriate Relief. 8

B. If This Court Finds § 1226(a) Applies to Petitioner's Detention, the Government Substantially Complied with the Process Envisioned by § 1226(a) by Obtaining a Warrant. 11

C. If This Court Finds § 1226(a) Applies to Petitioner's Detention, an Alien Bears the Burden of Establishing Eligibility for Release on Bond 11

D. If This Court Finds § 1226(a) Applies to Petitioner's Detention, Neither Immediate Release nor a Burden-Shifted Hearing Should be Ordered. 14

1. First *Mathews* Factor: The Private Interest Affected 17

2. Second *Mathews* Factor: Risk of Erroneous Deprivation 18

3. Third *Mathews* Factor: The Government's Interest in Detention 19

Conclusion 20

TABLE OF AUTHORITIES

Cases

Acosta v. Arteta,
No. 1:25-CV-9916 (MKV),
2026 WL 263470 (S.D.N.Y. Feb. 2, 2026) 2

Alvarado Quezada v. Francis,
No. 26 CIV. 387 (JPC),
2026 WL 380711 (S.D.N.Y. Feb. 11, 2026) 2

Arana v. Arteta,
No. 1:26-CV-240-GHW,
2026 WL 279786 (S.D.N.Y. Feb. 3, 2026) 2

Arpac v. Rhoney,
W.D.N.Y. 26-cv-6118 (EAW) 10

Bhaktibhai-Patel v. Garland,
32 F.4th 180 (2d Cir. 2022)
abrogated on other grounds,
Azamov v. Bondi,
No. 24-1475-AG,
2025 WL 3096713 (2d Cir. Nov. 6, 2025) 1

Black v. Decker,
103 F.4th 133 (2d Cir. 2024) 15

Borbot v. Warden Hudson Cty. Corr. Facility,
906 F.3d 274 (3d Cir. 2018) 15

Bravo Perez v. Bondi,
No. 9:26-cv-00205 (ECC) 3, 10, 14

Canli v. Rhoney,
W.D.N.Y. 26-cv-6095 (EAW) 10

Chen v. Almodovar,
No. 25 CIV. 9995 (JPC),
2026 WL 507707 (S.D.N.Y. Feb. 24, 2026) 2

Dambrosio v. McDonald, Jr.,
No. 25-CV-10782-FDS,
2025 WL 1070058 (D. Mass. Apr. 9, 2025),
reconsideration denied,
793 F. Supp. 3d 271 (D. Mass. 2025) 20

Demore v. Kim,
538 U.S. 510 (2003) 8, 17

DHS v. Thuraissigiam,
591 U.S. 103 (2020) 9, 14, 17

Flores Pacheco v. Almodovar,
No. 26 CIV. 640 (JPC),
2026 WL 366994 (S.D.N.Y. Feb. 10, 2026) 2

Gaspar v. Akshar et al.,
No. 9:26-cv-00118 (BKS) (Feb. 17, 2026) 1, 6

Gudino v. Almodovar,
No. 1:26-CV-00402-MKV,
2026 WL 251887 (S.D.N.Y. Jan. 30, 2026) 2, 6

Guillen v. Genalo,
No. 1:26-CV-1524-MKV,
2026 WL 507836 (S.D.N.Y. Feb. 24, 2026) 2

Hernandez-Lara v. Lyons,
10 F.4th 19 (1st Cir. 2021) 15

Huanga v. Decker,
599 F. Supp. 3d 131 (S.D.N.Y. 2022) 16, 19

Jennings v. Rodriguez,
583 U.S. 281 (2018) 9, 12

Johnson v. Guzman Chavez,
594 U.S. 523 (2021) 12

Kleindienst v. Mandel,
408 U.S. 753 (1972) 5

Konok v. Barr,
826 F. App'x 29 (2d Cir. 2020) 9

Lemine v. Kurzdorfer,
26-cv-193 (LJV) 10

Li v. Lynch,
658 F. App'x 14 (2d Cir. 2016) 9

Lopez v. Noem,
No. 26 CIV. 00345 (JHR),
2026 WL 266597 (S.D.N.Y. Feb. 2, 2026) 2

Lyttle v. Garland,
No. 21-6389,
2023 WL 2594001 (2d Cir. Mar. 22, 2023) 9

Mahmodi v. Marich,
No. 25-CV-6762-MAV,
2026 WL 113473 (W.D.N.Y. Jan. 15, 2026) 15, 16, 19, 20

Maldonado Bautista v. Noem,
No. 5:25-CV-01873-SSS-BFM,
2025 WL 3678485 (C.D. Cal. Dec. 18, 2025),
appeal filed
Maldonado Bautista v. U.S. Dep't of Homeland Sec.,
25-7958 (Dec. 19, 2025) 10

Maldonado Bautista v. Santacruz,
No. 5:25-CV-01873-SSS-BFM,
2026 WL 468284 (C.D. Cal. Feb. 18, 2026),
appeal filed
Maldonado Bautista v. U.S. Dep't of Homeland Sec.,
26-1044 (Feb. 23, 2026) 10

Martins v. Akshar,
No. 9:26-cv-000095 (MAD) 10

Mathews v. Eldridge,
424 U.S. 319 (1976) 15

McDonald v. Feeley,
535 F. Supp. 3d 128 (W.D.N.Y. 2021) 11

Miranda v. Garland,
34 F.4th 338 (4th Cir. 2022) 15, 18

Mohamud v. Bondi,
W.D.N.Y. 26-cv-147 (LJV) 10

Munoz-Moran v. Marich,
W.D.N.Y. 26-cv-6087 (EAW) 10

Noguez v. Brophy,
9:26-cv-00030 (MAD) 10

Ochoa Nava v. Marich,
W.D.N.Y. 26-cv-6105 10

Onosamba-Ohindo v. Searls,
678 F. Supp. 3d 364 (W.D.N.Y. 2023) 16

Ozturk v. Hyde,
136 F.4th 382 (2d Cir. 2025) 6

Pena v. Hyde,
No. CV 25-11983-NMG,
2025 WL 2108913 (D. Mass. July 28, 2025) 20

Quintero v. Francis,
No. 25-CV-10107 (MKV),
2026 WL 265921 (S.D.N.Y. Feb. 2, 2026) 2

Raspoutny v. Decker,
708 F. Supp. 3d 371 (S.D.N.Y. 2023) 19

Ridoy v. Bondi,
W.D.N.Y. 26-cv-146 (LJV) 10

Rodriguez Diaz v. Garland,
53 F.4th 1189 (9th Cir. 2022) 15, 17

Rodriguez-Acurio v. Almodovar,
No. 2:25-cv-6065 (NJC),
2025 WL 3314420 (E.D.N.Y. Nov. 28, 2025) 8

Saamishvili v. Flanagan,
No. 25-CV-6178 (BMC),
2026 WL 377574 (E.D.N.Y. Feb. 11, 2026) 2

U.S. ex rel. Knauff v. Shaughnessy,
338 U.S. 537 (1950) 14

Uzumcuoglu v. Bondi,
W.D.N.Y. 26-cv-6077 (EAW) 10

Velasco Lopez v. Decker,
978 F.3d 842 (2d Cir. 2020) ..... passim

Zadvydas v. Davis,
533 U.S. 678 (2001) 14, 18

Other Authorities

Matter of Adeniji,
22 I. & N. Dec. 1102 (BIA 1999) 13

Matter of Fatahi,
26 I. & N. Dec. 791 (BIA 2016) 13

Matter of Guerra,
24 I. & N. Dec. 37 (BIA 2006) 13

Matter of Q. Li,
29 I. & N. Dec. 66 (BIA 2025) 7

Matter of R-A-V-P-,
27 I. & N. Dec. 803 (BIA 2020) 13

Matter of Urena,
25 I. & N. Dec. 140 (BIA 2009) 13

Matter of Yajure Hurtado,
29 I. & N. Dec. 216 (BIA 2025) 9

Statutes

28 U.S.C. § 1254(1) 5

28 U.S.C. § 2241 6

8 U.S.C. § 1101(b)(4) 5

8 U.S.C. § 1158(a) 5

8 U.S.C. § 1225(b)(2)(A) ..... *passim*

8 U.S.C. § 1226(a) ..... *passim*

8 U.S.C. § 1229a 5

8 U.S.C. § 1231(b)(3) 5

8 U.S.C. § 1252 5

8 U.S.C. § 1357(a)(2) 7

Regulations

8 C.F.R. § 1003.1(b) 5

8 C.F.R. § 1003.38(a) 5

8 C.F.R. § 1236.1 ..... 12, 13

8 C.F.R. § 1240.46(c) 5

8 C.F.R. § 1240.7(a) 5

8 C.F.R. § 287.3 7

PRELIMINARY STATEMENT

Petitioner, Nadeem Hassan, entered on an unknown date at an unknown location and remains within the United States unlawfully. He did not present himself for admission or parole and was not inspected. On February 26, 2026, Petitioner was apprehended following the issuance of a warrant, the execution of a targeted enforcement action, and an ensuing foot chase. The executive branch had the congressionally-granted right—and congressionally-imposed duty—to detain Petitioner under 8 U.S.C. § 1225(b)(2)(A). But officials here also had a warrant issued for Petitioner's arrest.

The primary issue this Petition raises is whether the statutory authority of ICE to detain Petitioner is 8 U.S.C. §§ 1225(b)(2)(A), and whether Petitioner is entitled to a bond hearing. The Government maintains that Petitioner, who was present in the United States without admission or parole when ICE apprehended and detained him, is subject to mandatory detention under § 1225(b)(2)(A). The Government also maintains that Petitioner has "not 'effected an entry' into the United States" and therefore has "'only those rights regarding admission that Congress has provided by statute' and 'cannot claim any greater rights under the Due Process Clause.'" *Bhaktibhai-Patel v. Garland*, 32 F.4th 180, 199 (2d Cir. 2022) (citation omitted), *abrogated on other grounds*, *Azamov v. Bondi*, No. 24-1475-AG, 2025 WL 3096713 (2d Cir. Nov. 6, 2025).

The Government does not consent to relief being granted here. The Government reserves all rights, including the right to appeal the writ in this case. But the Government acknowledges that this Court's decision in *Gaspar v. Akshar et al.*, No. 9:26-cv-00118 (BKS), Dkt. # 13 (Feb. 17, 2026), analyzed whether § 1225(b)(2)(A) authorizes Petitioner's detention here as a general matter. Therefore, the Government relies on, and incorporates by reference, the legal arguments it presented in *Gaspar v. Akshar*, No. 9:26-cv-00118 (BKS), on the general statutory interpretation issue. Katz Decl., Exh. **"A"**, at 2–11, 16–22. The Government acknowledges that other orders

within this district have reached similar results since *Gaspar*, but also notes no authoritative appellate guidance exists within the Second Circuit as on the issue of ICE's statutory detention authority.[1] And, although the majority of district court decisions across this circuit have continued to reach results similar to the *Gaspar* decision, the minority position within the circuit continues to endure and evolve, too. *Chen v. Almodovar*, No. 25 CIV. 9995 (JPC), 2026 WL 507707 (S.D.N.Y. Feb. 24, 2026); *Guillen v. Genalo*, No. 1:26-CV-1524-MKV, 2026 WL 507836 (S.D.N.Y. Feb. 24, 2026); *Saamishvili v. Flanagan*, No. 25-CV-6178 (BMC), 2026 WL 377574 (E.D.N.Y. Feb. 11, 2026); *Alvarado Quezada v. Francis*, No. 26 CIV. 387 (JPC), 2026 WL 380711 (S.D.N.Y. Feb. 11, 2026); *Flores Pacheco v. Almodovar*, No. 26 CIV. 640 (JPC), 2026 WL 366994 (S.D.N.Y. Feb. 10, 2026); *Arana v. Arteta*, No. 1:26-CV-240-GHW, 2026 WL 279786 (S.D.N.Y. Feb. 3, 2026); *Acosta v. Arteta*, No. 1:25-CV-9916 (MKV), 2026 WL 263470 (S.D.N.Y. Feb. 2, 2026); *Lopez v. Noem*, No. 26 CIV. 00345 (JHR), 2026 WL 266597 (S.D.N.Y. Feb. 2, 2026); *Quintero v. Francis*, No. 25-CV-10107 (MKV), 2026 WL 265921 (S.D.N.Y. Feb. 2, 2026); *Gudino v. Almodovar*, No. 1:26-CV-00402-MKV, 2026 WL 251887 (S.D.N.Y. Jan. 30, 2026).

Factual and legal distinctions exist between *Gaspar* and this case. First, the presence of a warrant in this case distinguishes *Gaspar*. Therefore, even if § 1225(b)(2)(A) does not apply here, Petitioner should not be released. The Petition does not allege Petitioner sought—or was denied—a bond hearing before an immigration court. If any relief is granted, it should be a bond hearing with burdens of proof in line with administrative practice and before the immigration courts. Second, the alien in *Gaspar* had Special Immigrant Juvenile classification, which Petitioner does

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[1] This Court also noted the Fifth Circuit issued its decision in *Buenrostro-Mendez v. Bondi*, 166 F.4th 494 (5th Cir. 2026), which adopted the Government's interpretation of its statutory detention authority under § 1225(b)(2)(A), but juxtaposed the Fifth Circuit's decision against a decision from the Seventh Circuit.

not have here. Third, this case is factually distinguishable from *Gaspar* because Petitioner was not apprehended and released around the time of his unlawful entry at the border, as was the case in *Gaspar*. Instead, Petitioner was encountered and apprehended by federal immigration officials for the first time after his unlawful entry on February 26, 2026, when he was detained and this suit was commenced. Fourth, insofar as Petitioner commenced this case on the same day he was apprehended, his detention here was four months shorter than in *Gaspar*. Relatedly, because of the speed with which Petitioner here commenced suit after apprehension, there have not been any proceedings before the immigration court when this action was filed.

The remedy here should differ from *Gaspar* because this case is more like *Bravo Perez v. Bondi*, No. 9:26-cv-00205 (ECC), than *Gaspar*. In *Bravo Perez*, like here, a detainee commenced suit on the day he was detained. And, like here, the detainee had entered the United States without inspection and had not previously been detained. But the remedy there was not immediate release. Instead, Respondents were ordered "to afford Petitioner an individualized bond hearing before an immigration judge within 10 days of the date of this order." *Bravo Perez v. Bondi*, No. 9:26-cv-00205 (ECC), Dkt. # 10 at 2.

FACTUAL BACKGROUND

Petitioner is a native and citizen of Pakistan. Sadiq Decl. ¶ 4.[2], Petitioner admits he entered the United States without inspection, allegedly on October 9, 2023. Dkt. # 1 ¶ 2. Petitioner does not claim to have been inspected, admitted to the United States, or granted parole on entry or at any time since. *See generally* Dkt. # 1.

Petitioner does not allege he had been apprehended before February 26, 2026. *Id.* On that date, a warrant was issued for Petitioner's apprehension and DHS officials commenced a targeted enforcement operation at Petitioner's suspected residence. Sadiq Decl. ¶¶ 6, 7. After surveilling the property, a male matching Petitioner's physical description entered a vehicle registered to Petitioner. *Id.* ¶ 8. DHS officials followed the vehicle until it stopped. *Id.* DHS officials then approached the vehicle. *Id.*

DHS officials asked Petitioner to put the vehicle in park. *Id.* ¶ 9. Petitioner instead put the vehicle in reverse multiple times—despite multiple instructions—before putting the vehicle in park and exiting the vehicle. *Id.*

Petitioner then fled on foot across a roadway. *Id.* ¶ 10. When DHS officials caught Petitioner, he resisted arrest. *Id.*

Petitioner was taken to an ICE office, where ICE confirmed his identity biometrically. *Id.* ¶ 14. While in ICE custody, Petitioner admitted he was an alien. *Id.* ¶ 11 Petitioner has been charged with violating 8 U.S.C. § 1182(a)(6)(A)(i), "in that [he is] an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General," and with violating 8 U.S.C.

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[2] Petitioner told ICE agents he had a legal right to reside in Mexico and has a child there. Sadiq Decl., Exh. **"A"**, at 3. Petitioner sought asylum as to Pakistan. *See id.* ¶ 2.

§ 1182(a)(7)(A)(i)(I) "as an immigrant who, at the time of application for admission, is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document required by the Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality . . . ." *Id.* ¶ 12.

Petitioner commenced suit the same day. Dkt. 1.[3]

The Petition does not allege Petitioner has ever requested or was denied a bond hearing.

LEGAL BACKGROUND

Congress exercises "plenary power to make rules for the admission of foreign nationals." *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972). 8 U.S.C. § 1225(b)(2) establishes the default removal proceeding, which "applies to all applicants for admission."[4] An immigration judge decides whether an alien will be removed. 8 U.S.C. §§ 1101(b)(4), 1229a(a)(1). Aliens have a right to counsel of their choice at no expense to the government, the right to testify, the right to "examine the evidence against [them]," "to present evidence," and "to cross-examine witnesses presented by the Government." 8 U.S.C. § 1229a(b)(4); 8 C.F.R. §§ 1240.7(a), 1240.46(c). Aliens may seek action on pending asylum claims, ask to have removal withheld, and seek protection under the Convention Against Torture. 8 U.S.C. §§ 1158(a), 1231(b)(3). Aliens ordered removed may seek reconsideration or administrative appeal. 8 U.S.C. § 1229a(c)(5), (6); 8 C.F.R. §§ 1003.1(b), 1003.38(a). Finally, after exhausting the administrative process, an alien can file a petition for review in a court of appeals and then in the Supreme Court. 8 U.S.C. § 1252; 28 U.S.C. § 1254(1).

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[3] The Petition discusses release and redetention of aliens, which is not applicable here. *Id.* ¶ 40.

[4] The term "admission" is defined by the INA to mean "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A); *see also* 8 C.F.R. § 1235.1 (setting forth inspection procedures).

STANDARD OF REVIEW

The writ of habeas corpus extends to a prisoner who is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). District courts may grant a writ "within their respective jurisdictions." *Id.* § 2241(a). Generally, "'[w]henever a § 2241 habeas petitioner seeks to challenge his present physical custody within the United States, he must file the petition in the district of confinement and name his immediate custodian as the respondent." *Ozturk v. Hyde*, 136 F.4th 382, 390 (2d Cir. 2025) (citation omitted).

ARGUMENT

I. 8 U.S.C. § 1225(b)(2)(A) Governs Petitioner's Detention.

Respondents maintain 8 U.S.C. § 1225(b)(2)(A) mandates Petitioner's detention as set forth in the Government's brief in *Gaspar*. It is undisputed that Petitioner is unlawfully present in the United States without admission or parole and inspection within the meaning of the INA, as amended by IIRIRA. What's more, this is not a case of re-detention like *Gaspar*. Petitioner here has been detained for the first time on February 26, 2026. Therefore, 8 U.S.C. § 1225(b)(2)(A) mandates detention during his removal proceedings. Although a warrant for arrest was issued here, it does not bear on the Government's authority to detain Petitioner under 8 U.S.C. § 1225(b)(2)(A). *Gudino v. Almodovar*, No. 1:26-CV-00402-MKV, 2026 WL 251887 (S.D.N.Y. Jan. 30, 2026) ("[T]he . . . Warrant tells us only that the immigration officer who executed it was 'authorized' to do so 'pursuant to 8 U.S.C. §§ 1226, 1357 and 8 C.F.R. Part 287.' Form I-200. This is not a case about the validity of that officer's '[p]ower and authority to arrest' under 8 C.F.R. Part 287.5(c). Nor is it a case about the validity of the . . . Warrant under 8 U.S.C. § 1226. Nor is it even a case about the scope of the immigration officer's '[p]owers without a warrant . . . to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any' 'law or regulation . . . regulating the admission, exclusion, expulsion, or removal

of aliens' under 8 U.S.C. § 1357(a)(2). Instead, the question presented is whether Petitioner is 'detained under § 1226(a) and therefore [has] the right to a bond hearing.' . . . He is not, and the fact that an immigration officer served him with a warrant when one might not have been required does not change that conclusion."). The applicable and mandatory duty to detain imposed by § 1225(b)(2)(A) overrides any other, generalized procedure under which requests for bond can be entertained.[5]

As a result, the existence of a warrant for arrest in this case does not foreclose the conclusion that § 1225(b)(2)(A) is the statute that authorizes Petitioner's detention, and therefore that he is not entitled to a bond hearing. *Id.* ("No doubt, the Executive Branch is aware that 'numerous judges in this district and other jurisdictions' agree with Petitioner as to the appropriate resolution of that question. Indeed, that may well explain, in prophylactic terms, the decision to afford applicants for admission like Petitioner more process than that which is clearly due. Whatever the explanation, the Court declines to hold that the issuance of an unnecessary warrant, *see* Form I-200, or the execution of an inapplicable form, *see* Form ICD, somehow divests the Executive Branch of authority that otherwise 'clearly applies,' and that accordingly must be applied here." (citations omitted)).

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[5] A warrant is not required where § 1225 applies or anywhere else if an immigration officer "has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest . . . ." 8 U.S.C. § 1357(a)(2); 8 C.F.R. § 287.3(a), (b) (recognizing warrantless arrests); *see Matter of Q. Li*, 29 I. & N. Dec. 66, 70 n.5 (BIA 2025). Holding that the mere presence of a warrant for arrest vitiates the duty to detain imposed by § 1225(b)(2)(A) would disincentivize obtaining warrants whenever § 1225(b)(2)(A) applies. Indeed, regulations promulgated pursuant to § 1357 allow a warrant of arrest to issue within 48 hours (or an "additional reasonable period of time" given any emergency or other extraordinary circumstances). 8 C.F.R. § 287.3(d). These types of warrants are permissible. *Q. Li*, 29 I. & N. Dec. at 69 n.4. Although the presence of the warrant does not require the § 1357 analysis, Petitioner did attempt to escape and therefore could have been arrested without a warrant under § 1357(a) even absent the mandate in § 1225(b)(2)(A).

II. No Relief Should be Granted, but if this Court Grants Relief, then a Bond Hearing as Opposed to Immediate Release Should be Ordered.

"Detention during deportation [is] a constitutionally valid aspect of the deportation process." *Demore v. Kim*, 538 U.S. 510, 523 (2003).

A. Section 1225(b)(2)(A) Governs Petitioner's Detention, Therefore Petitioner is Not Entitled to a Bond Hearing Pursuant to the Statute, but if the Court Finds Due Process Requires More, then a Bond Hearing is the Appropriate Relief.

If the Court finds § 1225(b)(2)(A) governs Petitioner's detention, the Court should apply the statute and refuse to grant any detention hearing as a matter of statutory law. However, if the Court finds due process requires more than § 1225(b)(2)(A) as applied to Petitioner, which Respondents deny, then Petitioner's remedy should be limited to allowing Petitioner to pursue an administrative bond hearing under procedures established for such hearing. Although some courts have ordered immediate release where the Government apprehended an alien without a warrant and then denied a requested bond hearing based on its position that § 1225(b)(2)(A) applied pre-suit, neither fact is not present here.

Indeed, the warrant here distinguishes *Rodriguez-Acurio v. Almodovar*, No. 2:25-cv-6065 (NJC), 2025 WL 3314420, at *31 (E.D.N.Y. Nov. 28, 2025). Unlike there, the detention here cannot be said to be "unlawful from its inception," because here even if this Court disagrees that § 1225(b)(2)(A) governs Petitioner's detention and instead finds § 1226(a) applies to Petitioner's detention, Respondents had a warrant to arrest Petitioner and the Petition does not allege Petitioner requested or was denied a bond hearing before commencing suit.[6]

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[6] While no bond hearing is required for detainees under § 1225(b)(2)(A), the Government provided Petitioner a "Class Action Notice" informing Petitioner about "a ruling that certain immigration detainees may be unlawfully detained and may seek release on bond or conditional parole under 8 U.S.C. § 1226(a)," that he "may be entitled to request release on bond or conditional parole" and that he "may also be entitled to a bond hearing upon your request." Sadiq Decl., Exh. **"A"** at 12.

Due process does not require more for Petitioner, who unlawfully entered the United States and therefore remains an applicant for admission. As an alien who entered the United States outside of a port of entry without admission or parole and inspection, the Supreme Court has noted Petitioner should be "'treated' for due process purposes as if stopped at the border" because they have not been lawfully admitted. *DHS v. Thuraissigiam*, 591 U.S. 103, 139 (2020). Because Petitioner has not lawfully entered the United States, he is an applicant for admission. And Congress has not created any procedural rights to a bond hearing for applicants for admission (like Petitioner). *See Jennings v. Rodriguez*, 583 U.S. 281, 297 (2018). Thus, due process entitles him to no more than what the INA would provide him.

Relatedly, if this Court orders a bond hearing as a matter of due process notwithstanding the congressionally-imposed prohibition against release contained in § 1225(b)(2)(A), which Respondents argue would be improper, a bond hearing where Petitioner bears the burden of proving entitlement to release vitiates any prejudice Petitioner could claim, which would itself cure any prejudice, an essential element of a due process claim. *Lyttle v. Garland*, No. 21-6389, 2023 WL 2594001 (2d Cir. Mar. 22, 2023); *Konok v. Barr*, 826 F. App'x 29 (2d Cir. 2020); *Li v. Lynch*, 658 F. App'x 14 (2d Cir. 2016). If a bond hearing should have been provided but was not provided, any prejudice could be mitigated by giving Petitioner a hearing, which would trigger an administrative hearing and a right of administrative appeal.

Nor is any purported prohibition on having bond hearings a reason to order immediate release. There is no evidence that Petitioner would be denied a bond hearing or that the bond hearing would not be effective (an argument that would need to be raised in the administrative process, in any event) if ordered. The Petition cites *Matter of Yajure Hurtado*, 29 I. & N. Dec. 216 (BIA 2025), and a July 8, 2025, policy, which have both been vacated by the Central District of

California and which are subject to appeals. *Compare* Dkt. # 1 ¶¶ 11, 32–34, *with Maldonado Bautista v. Noem*, No. 5:25-CV-01873-SSS-BFM, 2025 WL 3678485 (C.D. Cal. Dec. 18, 2025), *appeal filed Maldonado Bautista v. U.S. Dep't of Homeland Sec.*, 25-7958 (Dec. 19, 2025) (vacating July 8, 2025 action), *and Maldonado Bautista v. Santacruz*, No. 5:25-CV-01873-SSS-BFM, 2026 WL 468284 (C.D. Cal. Feb. 18, 2026) (vacating *Yajure Hurtado*), *appeal filed Maldonado Bautista v. U.S. Dep't of Homeland Sec.*, 26-1044 (Feb. 23, 2026).

Zooming in, there is certainly no evidence in this district that orders granting bond hearings are not being abided by. To the contrary, bond hearings have been ordered three times in this district, and the Government has complied and the hearing has proceeded. *Bravo Perez*, No. 9:26-cv-00205 (ECC); *Martins v. Akshar*, No. 9:26-cv-000095 (MAD); *Noguez v. Brophy*, 9:26-cv-00030 (MAD). And, at these hearings, bond has been set. What's more, review of docket entries in cases pending in the Western District of New York reveals that immigration judges are also setting bond in response to bond hearings ordered by the district courts. *See, e.g.*, *Lemine v. Kurzdorfer*, 26-cv-193 (LJV); *Arpac v. Rhoney*, W.D.N.Y. 26-cv-6118 (EAW); *Ochoa Nava v. Marich*, W.D.N.Y. 26-cv-6105; *Ridoy v. Bondi*, W.D.N.Y. 26-cv-146 (LJV); *Mohamud v. Bondi*, W.D.N.Y. 26-cv-147 (LJV); *Munoz-Moran v. Marich*, W.D.N.Y. 26-cv-6087 (EAW); *Canli v. Rhoney*, W.D.N.Y. 26-cv-6095 (EAW); *Uzumcuoglu v. Bondi*, W.D.N.Y. 26-cv-6077 (EAW).[7] These cited examples are numerous but non-exhaustive; in any event, they belie the citationless assertion that immigration judges are not entertaining bond hearings or issuing bond decisions in immigration courts.

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[7] In some of the cited examples, Petitioner's counsel was also the attorney of record. *See Ridoy*, W.D.N.Y. 26-cv-146 (LJV); *Mohamud*, W.D.N.Y. 26-cv-147 (LJV); *Canli*, W.D.N.Y. 26-cv-6095 (EAW); *Uzumcuoglu*, W.D.N.Y. 26-cv-6077 (EAW).

If the Court determines that Petitioner is entitled to any relief from detention under § 1225(b)(2)(A), the only appropriate remedy is a bond hearing before an Immigration Judge, during which the Immigration Judge can properly determine in the first instance whether Petitioner is a flight risk or danger to the community. *McDonald v. Feeley*, 535 F. Supp. 3d 128, 139 (W.D.N.Y. 2021) ("[T]he Court rejects Petitioner's contention that this Court should consider in the first instance whether he should be released and on what conditions.").

B. If This Court Finds § 1226(a) Applies to Petitioner's Detention, the Government Substantially Complied with the Process Envisioned by § 1226(a) by Obtaining a Warrant.

If the Court finds § 1226(a) applies to Petitioner's detention rather than § 1225(b)(2)(A), the proper remedy would still be a bond hearing where the Petitioner would bear the burden of proving entitlement to bond because § 1226(a) states, "[o]n a warrant issued by the Attorney General, an alien may be arrested" and that is what happened here: a warrant was issued before Petitioner's arrest. Specifically, the warrant was issued because a Supervisory Detention and Deportation Officer "determined there is probable cause to believe that" Petitioner "is removable from the United States . . . based upon: the execution of a charging document to initiate removal proceedings against the subject" and "other reliable evidence that affirmatively indicate[d] the subject . . . lack[ed] immigration status." Sadiq Decl., Exh. **"A"** at 6.

C. If This Court Finds § 1226(a) Applies to Petitioner's Detention, an Alien Bears the Burden of Establishing Eligibility for Release on Bond.

If this Court finds 8 U.S.C. § 1226 applies to Petitioner's detention here, § 1226 contemplates that any bond hearing *follows* detention, as opposed to preceding it. Therefore, the Government has the right to detain a Petitioner pending the outcome of a requested bond hearing (although Petitioner here does not allege he sought, or was refused, a bond hearing). Therefore, even if § 1226 governs Petitioner's detention, it is not a violation of § 1226(a) to detain a Petitioner

pending the outcome of a bond hearing. And, of course, the ability to *ask for* a bond hearing does not equate to the entitlement to *receive release on bond*. Section 1226 provides the executive branch "may continue to detain the arrested alien" after apprehension, but also explains the executive branch "may release the alien on (A) bond . . . or conditional parole" until removal proceedings conclude. 8 U.S.C. § 1226(a). Thus, while § 1226 permits the executive branch to release an alien on bond (or conditional parole), it also allows the executive branch to continue to detain the noncitizen. *See id.*; *see also Johnson v. Guzman Chavez*, 594 U.S. 523, 526-27 (2021) (recognizing § 1226(a) as permissive); *Jennings*, 583 U.S. at 306 ("Section 1226(a) creates a default rule . . . permitting—but not requiring—the Attorney General to issue warrants . . . [and] release . . . on bond.").

To the extent this Court finds § 1226(a) applies to Petitioner's detention, Petitioner could request a bond hearing. Where detention falls under § 1226(a), an immigration officer has discretionary authority to detain or release an alien after apprehension if the alien "demonstrate[s] to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding." 8 C.F.R. § 1236.1(c)(8). If the officer does not release the alien under this power, the alien can request a hearing before an immigration judge, who can decide "to detain the alien in custody, release the alien, and determine the amount of bond, if any, under which the respondent may be released." 8 C.F.R. § 1236.1(d)(1).

The Board of Immigration Appeals has long placed the burden of proof on the alien in these proceedings. *E.g.*, *Matter of Guerra*, 24 I. & N. Dec. 37 (BIA 2006); *Matter of Fatahi*, 26 I. & N. Dec. 791, 795 n.3 (BIA 2016); *Matter of R-A-V-P-*, 27 I. & N. Dec. 803 (BIA 2020).[8] To establish entitlement to release in immigration court, Petitioner would have to show Petitioner is (1) not a danger to community or property, (2) not a national security threat, and (3) not a flight risk. *Matter of Adeniji*, 22 I. & N. Dec. 1102 (BIA 1999); *Guerra*, 24 I. & N. Dec. 37; *Matter of Urena*, 25 I. & N. Dec. 140 (BIA 2009). The immigration judge's decision is appealable to the Board of Immigration Appeals. 8 C.F.R. § 1236.1(d)(3). There is no reason to deviate from that standard practice here even if detention is governed by § 1226(a) in light of the warrant issued prior to Petitioner's arrest and the fact that placing the burden on the Petitioner comports with administrative practice in those circumstances.

Here, assuming the Court finds the appropriate statutory detention authority is § 1226(a), which the Government does not concede, then the appropriate remedy for this Court is to order an immigration judge bond hearing, consistent with the process set forth in § 1226(a), the long-established regulatory framework for custody decisions, and long-standing administrative precedent. This result is particularly apt here, where (1) Petitioner had been apprehended pursuant to a warrant just hours before he commenced suit, (2) Petitioner had not even been transported to his intended detention facility before Petitioner commenced suit, (3) Petitioner does not allege he sought a bond hearing, and (4) Petitioner does not allege he was refused a bond hearing. Indeed,

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[8] Respondents note there is a circuit split as to whether, and when, the burden of proof should fall to the Government as a matter of due process notwithstanding the Board of Immigration Appeals' precedent. The Second Circuit's contribution to the circuit split, discussed below, shifted the burden, but in the context of extended detention—a crucial fact not present here. *Velasco Lopez v. Decker*, 978 F.3d 842, 851 (2d Cir. 2020).

that result adhered in *Bravo Perez*: Respondents were ordered "to afford Petitioner an individualized bond hearing before an immigration judge within 10 days of the date of this order." *Bravo Perez*, No. 9:26-cv-00205 (ECC), Dkt. # 10 at 2.

D. If This Court Finds § 1226(a) Applies to Petitioner's Detention, Neither Immediate Release nor a Burden-Shifted Hearing Should be Ordered.

Petitioner seeks immediate release. But Petitioner is not entitled to immediate release given on the facts of this case and because Petitioner would not otherwise be eligible for immediate release even if this Court finds § 1226(a) governs detention here. In the alternative, Petitioner seeks a bond hearing modified from normal procedures where the Government—as opposed to Petitioner—would bear the burden of establishing Petitioner should remain detained. As with Petitioner's request for immediate release, Petitioner cannot point to any statutory or regulatory support for this request. Petitioner has not been admitted to the United States. Therefore, as with any unadmitted noncitizen, the only process due to Petitioner under the Constitution is that which he receives by virtue of the INA. *Thuraissigiam*, 591 U.S. at 138–40; *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.").

There is no case-specific basis to shift the burden here. Petitioner's detention falls well within the "presumptively reasonable period of detention . . . [of] six months," established by the Supreme Court in *Zadvydas v. Davis*, 533 U.S. 678 (2001). Dkt. # 1 ¶ 46. As the Petition appears to acknowledge, courts that have shifted the burden to the Government have done so when faced with detention longer than that six-month period. Dkt. # 1 ¶¶ 45, 46. The Second Circuit addressed

issue in *Velasco Lopez v. Decker*, 978 F.3d 842, 851 (2d Cir. 2020).[9] There, an alien had been detained under § 1226(a) for nearly 15 months. *See Mahmodi v. Marich*, No. 25-CV-6762-MAV, 2026 WL 113473, at *7 (W.D.N.Y. Jan. 15, 2026). To determine what due process required in that case, the *Velasco Lopez* court applied the balancing test from *Mathews v. Eldridge*, 424 U.S. 319 (1976). *Velasco Lopez*, 978 F.3d at 851; *see also Mahmodi*, 2026 WL 113473, at *6. The Court concluded that the petitioner's 15-month detention under § 1226(a), without a determination that he was a danger to the community or flight risk, violated due process and ordered the Government to conduct a bond hearing where the Government bore the burden of establishing a trigger for continued detention by clear and convincing evidence. *Id.* at 855, 857.

But Petitioner's claim does not implicate *Velasco Lopez* because he had not been detained for six months—or even *one whole day*—when he commenced suit just hours after his apprehension. Indeed, the *Velasco Lopez* decision itself acknowledged there could be an initial detention period where "the Government's interest . . . initially outweighed short-term deprivation of [the petitioner]'s liberty interests." *Velasco Lopez*, 978 F.3d at 855. The Second Circuit recently reaffirmed its discussion in *Velasco Lopez* pertained to prolonged detentions past the presumptively reasonable six-month period, and even in those circumstances the Court noted, "the flexible due process analysis counsels against establishing a bright-line rule." *Black v. Decker*, 103 F.4th 133, 150 (2d Cir. 2024).

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[9] The circuits have split as to whether the burden should shift to the Government to justify detention. Other circuit courts are also split on how to allocate the burden of proof at bond hearings after prolonged detention. *Compare Hernandez-Lara v. Lyons*, 10 F.4th 19, 41 (1st Cir. 2021), *with Miranda v. Garland*, 34 F.4th 338, 366 (4th Cir. 2022), *and Borbot v. Warden Hudson Cty. Corr. Facility*, 906 F.3d 274, 279 (3d Cir. 2018), *and Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1205, 1214 (9th Cir. 2022).

If this Court disagrees, due process does not require the Government to bear the burden of proof under the *Mathews* test, employed in *Velasco Lopez*, on the facts of this case. The test requires courts to consider the following: (1) the private interest that will be affected by the official action; (2) the risk of erroneous deprivation of that interest through the procedures used; and (3) the Government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail. *Velasco Lopez*, 978 F.3d at 851 (citing *Mathews*, 424 U.S. at 335).[10] Notably, following *Velasco Lopez*, district courts in the Second Circuit have reached conflicting results. *Mahmodi*, 2026 WL 113473, at *6.

Although some district courts have held that the Government must bear the burden of proof at § 1226(a) hearings as a rule, other district courts have concluded that *Velasco Lopez* requires case-specific balancing of the *Mathews* factors to determine if the allocation of the burden of proof at a § 1226(a) hearing violated due process. *See id.* (citing cases). Indeed, the *Bravo Perez* court had these same requests before it in substantially—if not virtually—the same form made by the same attorney, but nevertheless it did not order either form of requested relief and instead ordered a bond hearing without further relief. *Compare Bravo Perez*, No. 9:26-cv-00205 (ECC), Dkt. # 1, *with Bravo Perez*, No. 9:26-cv-00205 (ECC), Dkt. # 10 at 2.

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[10] Within the Second Circuit, district courts have observed that *Velasco Lopez* is not an "abstract analysis," but rather its analysis was fact-specific and relied "heavily on the specifics of petitioner's detention in assessing the strength of his individual interest." *Mahmodi*, 2026 WL 113473, at *6 (citing *Onosamba-Ohindo v. Searls*, 678 F. Supp. 3d 364, 373 (W.D.N.Y. 2023); *Huanga v. Decker*, 599 F. Supp. 3d 131, 140-41 (S.D.N.Y. 2022)).

1. First *Mathews* Factor: The Private Interest Affected

Although "the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings," *Demore*, 538 U.S. at 526, at the highest level the affected private interest here is "the most significant liberty interest there is—the interest in being free from imprisonment," *Velasco Lopez*, 978 F.3d at 851, and, if this Court finds § 1226 applies to Petitioner's detention, the liberty interest would more precisely be defined as his right to have the chance to be released on bond. Invoking that interest, however, does not end the inquiry, especially where Petitioner has been detained only for hours when he commenced suit—and only five days now. Indeed, "it is important not to overstate the strength of [Petitioner]'s showing under the first *Mathews* factor." *Rodriguez Diaz*, 53 F.4th at 1207.

Additionally, Petitioner does not dispute he is subject to removal proceedings and does not claim he was lawfully admitted or paroled to the United States. The Supreme Court has acknowledged an alien arriving in the United States "has only those rights regarding admission that Congress has provided by statute," tempered by any statutory qualifications. *Thuraissigiam*, 591 U.S. at 140. And "an alien in [Petitioner's] position has only those rights regarding admission that Congress has provided by statute." *Id.* At most, Petitioner claims he has a pending asylum claim. But Petitioner does not—and cannot—invoke any purported right to be free from detention because an unlawfully present alien has a pending asylum application. Finally, Petitioner may be detained only while his removal proceedings are pending. *See, e.g.*, *Demore*, 538 U.S. at 528 (finding a significant due process consideration to be that detention has a "definite termination point"). Also, critically, Petitioner was detained on the same day that he filed his Petition and, so far, has been detained for only five days. *See Velasco Lopez*, 978 F.3d at 852, 854. By contrast, in *Velasco Lopez*, the Second Circuit found that shifting the burden to the Government was fair only

after a finding that detention had become prolonged over 15 months.

Thus, the facts of this case do not support requiring the additional procedures contemplated by *Velasco Lopez*. Petitioner's very brief detention—only hours-long when he filed his Petition, and mere days at the time of this filing—significantly diminishes the weight that should be afforded to the first *Mathews* factor. *See Zadvydas*, 533 U.S. at 701 (recognizing six months as a presumptively constitutional removal period).

2. Second *Mathews* Factor: Risk of Erroneous Deprivation

Petitioner has not established his circumstances fall within the unique facts presented in *Velasco Lopez*. There, the detainee had been turned over to ICE custody after being arrested by state police on driving-while-intoxicated and related charges, waited four months before his first bond hearing, and then was detained for another eleven months. *Velasco Lopez*, 978 F.3d at 846-47.

Crucially there, but not present here, the Second Circuit found ICE did not initially produce him for state court criminal proceedings, he could not meet his burden to show the Immigration Judge that he was not a danger to the community based on the charges he faced. *See id.* Based on those unique facts, the Second Circuit found in *Velasco Lopez* that "the procedures underpinning [the petitioner]'s lengthy incarceration markedly increased the risk of error." *Id.* at 852.

Indeed, absent special circumstances, the Fourth Circuit has found this factor tips in the Government's favor, in part, because aliens should know much more about their history, family, and employment than the Government, and because they have the opportunity to retain counsel to represent them before the Immigration Judge. *Miranda*, 34 F.4th at 362.

Here, there is no evidence in the record that establishes—or even suggests—that the ordinary process is deficient. *See Mahmodi*, 2026 WL 113473, at *4-5 (summarizing the ordinary course of bond hearings and factors to be considered). Thus, Petitioner, who may be represented by counsel at an initial bond hearing,[11] has not demonstrated that he will be unable to obtain any required information or otherwise be at an informational disadvantage in comparison to the Government. As such, the risk of erroneous deprivation does not weigh in Petitioner's favor.

3. Third *Mathews* Factor: The Government's Interest in Detention

Under § 1225(b)(2)(A), Congress has mandated detention, which signifies the great importance of the Government's interest in detention. But, even where Congress has not mandated detention under § 1226(a), Congress did not mandate release. Instead, it granted the Attorney General broad discretion over detention decisions. *Cf.* 8 U.S.C. § 1226(a)(1)–(2). "[T]he Attorney General's discretion to detain individuals under § 1226(a) is valid where it advances a legitimate governmental purpose," such as ensuring the appearance of aliens at future immigration proceedings and ensuring they do not commit crimes. *Velasco Lopez*, 978 F.3d at 854. "The importance of these interests is well-established and not disputed." *Id.*

Notably for this case, courts have recognized, "it may not be a violation of due process for an alien to bear the burden of proof at a hearing that takes place shortly after their initial detention . . . and where a petition is filed after a relatively brief period." *Raspoutny v. Decker*, 708 F. Supp. 3d 371, 383 (S.D.N.Y. 2023) (quoting *Huanga*, 599 F. Supp. 3d at 139).

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[11] Petitioner's counsel has stated that Petitioner has counsel in the immigration proceeding.

A brief period of detention for the purpose of removal proceedings or to effectuate removal does not violate the constitution. *See Dambrosio v. McDonald, Jr.*, No. 25-CV-10782-FDS, 2025 WL 1070058, at *2 (D. Mass. Apr. 9, 2025), *reconsideration denied*, 793 F. Supp. 3d 271 (D. Mass. 2025) (3 months); *Pena v. Hyde*, No. CV 25-11983-NMG, 2025 WL 2108913, *2–3 (D. Mass. July 28, 2025) (1 month). Here, the Petition was filed *the same day as* Petitioner's arrest. He has been detained for five days. If a bond hearing is ordered, it will occur months earlier than in *Velasco Lopez*. Therefore, this factor weighs in the Government's favor.

For these reasons, Petitioner cannot show that due process requires the Government to bear the burden of proof at any bond hearing. *See Mahmodi*, 2026 WL 113473, at *6. Particularly considering the very limited duration of Petitioner's detention—mere days—Petitioner should bear the burden of proof at any bond hearing this Court orders.

CONCLUSION

For these reasons, Respondents respectfully request that this Court enter an Order denying the relief sought in the Petition in its entirety along with such further relief as this Court deems fair, just, and equitable.

Dated: March 3, 2026

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