UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

FADI NAYELI MORALES MENDEZ,

Petitioner,

v.

FIELD OFFICE DIRECTOR, U.S. Immigration and Customs Enforcement, Albany Field Office; DAVID FAVRO, in his official capacity as Sheriff/Warden, Clinton County Correctional Facility; KRISTI NOEM, in her official capacity as Secretary of Homeland Security; TODD LYONS, in his official capacity as Acting Director, U.S. Immigration and Customs Enforcement; and PAMELA BONDI, in her official capacity as Attorney General,

Respondents.

Civil Action No.: 9:26-cv-00337-ECC

FEDERAL RESPONDENTS'[1] RESPONSE TO PETITION PURSUANT TO ORDER TO SHOW CAUSE

TODD BLANCHE
Deputy Attorney General

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[1] The Federal Respondents are FIELD OFFICE DIRECTOR, U.S. Immigration and Customs Enforcement, Albany Field Office, KRISTI NOEM, in her official capacity as Secretary of Homeland Security, TODD LYONS, in his official capacity as Acting Director, U.S. Immigration and Customs Enforcement, and PAMELA BONDI, in her official capacity as Attorney General.

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PRELIMINARY STATEMENT

Petitioner, Fady Morales Mendez, unlawfully entered the United States on August 13, 2024, and unlawfully remains within the United States. She did not present herself at a port of entry for inspection, but rather crossed the Southern border on foot. She was initially apprehended on her date of entry. Removal proceedings were commenced. Because she needed medical treatment, she was released on her own recognizance. On February 18, 2026, officials took Petitioner back into custody and now detain her pursuant to 8 U.S.C. § 1225(b)(2)(A).

The first issue this Petition raises is whether ICE has the authority to detain Petitioner pursuant to 8 U.S.C. §§ 1225(b)(2)(A), which does not permit a bond hearing. The Government maintains Petitioner has been detained—and must be detained—under § 1225(b)(2)(A) because she is present in the United States without admission or parole and without lawful status and therefore is an "applicant for admission" under § 1225(a)(1). The Government also maintains that Petitioner has "not 'effected an entry' into the United States" for due process purposes 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 concede on these issues or consent to any 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 Memorandum Decision and Order in *Perdomo Perez v. Akshar*, No. 9:26-cv-00120-ECC, Dkt. No. 19 (Mar. 5, 2026), and its Order in *Bravo Perez v. Bondi*, Case No. 9:26-cv-00205-ECC, Dkt. No. 10 (Feb. 20, 2026), which invoked *Gaspar v. Akshar*, No. 9:26-cv-118 (BKS), Dkt. No. 13 at 12, as to the whether § 1225(b)(2)(A) or

§ 1226(a) applies as the detention authority for aliens like Petitioner. Therefore, the Government relies on, and incorporates by reference, the legal arguments it presented in *Perdomo Perez*, No. 9:26-cv-00205-ECC, on that issue. Katz Decl., Exh. **"A"**, at 10–15, 16–23. There is still no authoritative appellate guidance within the Second Circuit as on the issue of ICE's statutory detention authority.[2] And, district court decisions have remained split since the Order in *Bravo Perez*, with some decisions joining the minority position within the circuit. *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).

If this Court decides, contrary to the Government's arguments, that Petitioner is detained under 8 U.S.C. § 1226(a) instead of § 1225(b)(2)(A), then the only appropriate relief would be a bond hearing, for § 1226(a) gives the discretion to detain or release an alien to the Attorney General and not to the Court. This result is in line with the approach this Court toook in *Bravo Perez v. Bondi*, No. 9:26-cv-00205 (ECC). There, "the Court order[ed] Respondents to afford Petitioner an individualized bond hearing before an immigration judge within 10 days of the date of this order." Dkt. No. 10 at 2. If this Court views this as a due process matter and determines relief is warranted, the same result should adhere here for three reasons. First, this arrest involved a warrant. Second, Petitioner was only detained for 13 days prior to commencing suit (only 15 days now). Third, as a practical matter, Petitioner's release may be short-lived because Petitioner admitted she violated the terms of her release on recognizance, and so the Government could revoke Petitioner's Order of Release on Recognizance and re-detain her.

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[2] This Court noted *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 decision against another circuit's decision on a motion for a stay pending appeal. *Castanon-Nava v. U.S. Dep't of Homeland Sec.*, 161 F.4th 1048 (7th Cir. 2025).

FACTUAL BACKGROUND

Petitioner is a native and citizen of Guatemala. Miller Decl. ¶ 4. Petitioner admits she entered the United States without inspection, on August 13, 2024. Dkt. # 1 ¶ 2, 38. Petitioner does not claim to have been inspected, admitted to the United States, or granted parole on entry or at any time since. *Id.* ¶ 38. While the Petition is technically correct in stating, "Petitioner was not apprehended at the border at the moment of arrival," Petitioner was not initially "encountered and detained while present in the interior of the United States." *Id.* ¶ 45. Petitioner was encountered the same day she unlawfully entered and within a mile of the border. Miller Decl., Exh. **"A"**, at 5. During this encounter, officials concluded she was "likely to abscond." *Id.* at 6.

Petitioner was initially detained, but was released on her own recognizance for medical reasons. Miller Decl. ¶ 6. The Order of Release on Recognizance stated she "ha[d] been arrested and placed in removal proceedings" and she had to comply with conditions to remain on her own recognizance. *Id.* Petitioner admits removal proceedings were commenced after her initial apprehension, which remained pending until her current detention. Dkt. No. 1 ¶¶ 1, 39; *see also* Miller Decl., Exh. **"A"** at 8 (Notice to Appear).

Petitioner was taken back into custody on February 18, 2026. Miller Decl. ¶ 8. A warrant for her arrest issued based on "probable cause to believe that" she was "removable from the United States." *Id.*

While apprehended, Petitioner admitted violating the terms of her order of release on recognizance insofar as it clearly stated, "[e]mployment not authorized," yet Petitioner "claimed to work at Hudson Melco as a cook from April 2025 to present." Miller Decl., Exh. **"A"** at 13, 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). 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), 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 202.2(b). 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 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).

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 [the] present physical custody within the United States, [Petitioner] must file the petition in the district of confinement and name [the] 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.

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. Therefore, Respondents maintain 8 U.S.C. § 1225(b)(2)(A) mandates Petitioner's detention as set forth in the Government's brief in *Perdomo Perez*. Katz Decl., Exh. "**A**", at 10–15, 16–23. Relatedly, Petitioner's Administrative Procedure Act claim fails for the same reasons set forth in the Government's brief in *Perdomo Perez*. *Id.* at 27–29.

Although a warrant for Petitioner's arrest was present here, a warrant is not required for all arrests. For example, 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 (recognizing warrantless arrests), 236.1(b)(1) ("At the time of issuance of the notice to appear, or at any time thereafter and up to the time removal proceedings are completed, the respondent may be arrested . . . under the authority of Form I-200, Warrant of Arrest."), 1236.1 (same); *see Matter of Q. Li*, 29 I. & N. Dec. 66, 70 n.5 (BIA 2025). 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 a warrant issued here may be relevant to *arrest* authority, a warrant does not determine the *detention* authority under which Petitioner is currently held. The Government is detaining Petitioner under 8 U.S.C. § 1225(b)(2)(A). As explained in *Gudino v. Almodovar*, No. 1:26-CV-00402-MKV, 2026 WL 251887 (S.D.N.Y. Jan. 30, 2026), the 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.'" *Id.* at *3. It does not make any statement as to what statute authorizes ICE's detention of Petitioner. Moreover, because "[t]his 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)" or "a case about the validity of the . . . Warrant under 8 U.S.C. § 1226," or "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)," the presence of arrest authority under the warrant does not bear on the detention authority under § 1225(b)(2)(A). *Id.*

Here, like in *Gudino*, "the question presented is whether Petitioner is 'detained under § 1226(a) and therefore [has] the right to a bond hearing.'" *Id.* Because Petitioner is not detained under that provision but rather is detained under § 1225(b)(2)(A), "the fact that an immigration officer served [her] with a warrant when one might not have been required does not change that conclusion." *Gudino*, 2026 WL 251887, at *3. 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.

Holding that the mere presence of a warrant for arrest vitiates the detention authority granted by § 1225(b)(2)(A) or the duty to detain imposed by § 1225(b)(2)(A) would disincentivize obtaining warrants whenever § 1225(b)(2)(A) applies. Further, as one Southern District of New York decision explains, "[n]o 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," which "may well explain, in prophylactic terms, the decision to afford applicants for

admission like Petitioner more process than that which is clearly due." *Gudino*, 2026 WL 251887, at *4. But 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 she is not entitled to a bond hearing. *Id.* ("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.").

II. No Relief Should be Granted, but if this Court Grants Relief, then the Court Should Order a Bond Hearing Rather Than Immediate Release.

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

A. The Federal Respondents Complied With Section 1225(b)(2)(A), which Governs Petitioner's Detention.

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 because the statute does not permit a hearing and, instead, mandates detention.

B. Section 1225(b)(2)(A) Provides Due Process, but if the Court Finds Due Process Requires More, Ordering a Bond Hearing Would be the Appropriate Remedy.

Due process does not require more than § 1225(b)(2)(A) provides 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, she 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 her to no more than what the INA would provide her.

If the Court finds due process requires more than § 1225(b)(2)(A) as applied to Petitioner, which Federal Respondents deny, then Petitioner's remedy should be limited to allowing Petitioner to pursue an administrative bond hearing under procedures established for such hearing. Immediate release is not the appropriate remedy under these circumstances. *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."). 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 present here.

Indeed, the warrant here also renders immediate release inappropriate here and distinguishes *Rodriguez-Acurio v. Almodovar*, No. 2:25-cv-6065 (NJC), 2025 WL 3314420 (E.D.N.Y. Nov. 28, 2025), as well as *Perdomo Perez v. Akshar*, No. 9:26-cv-00120-ECC, Dkt. No. 19, issued on March 5, 2026. Unlike in those cases, Petitioner's detention cannot be said to be "unlawful from its inception," because even if this Court disagrees that § 1225(b)(2)(A) governs Petitioner's *detention* and instead finds § 1226(a) applies to Petitioner's *detention* (which the Federal Respondents deny), nevertheless the Government had a warrant to *arrest* Petitioner. Further, the Petition does not allege Petitioner requested—or, for that matter, was denied a bond hearing—before commencing suit.

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 Federal Respondents argue would be improper, a bond hearing where Petitioner bears the burden of proving entitlement to release vitiates any prejudice Petitioner could claim. *Lyttle v. Garland*, No. 21-6389, 2023 WL 2594001 (2d Cir. Mar. 22, 2023) (noting prejudice is an essential element of a due process claim); *Konok v. Barr*, 826 F. App'x 29 (2d Cir. 2020); *Li v. Lynch*, 658 F. App'x 14 (2d Cir. 2016). If this Court finds a bond hearing, which was not required under the statute and was not requested, should have been provided as a matter of due process, then any prejudice from failing to provide the hearing could be mitigated by giving Petitioner the hearing.

The evidence in this district is that orders granting bond hearings are followed, which belies any claim that immediate release must be ordered because ordering a bond hearing would be ineffective. Bond hearings have been ordered three times in this district (including once by this Court), 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*, No. 9:26-cv-00030 (MAD). And, while asking for a bond hearing should not be conflated with being granted bond, at these three hearings, bond has been set.

Likewise, docket entries in cases pending in the Western District of New York reveal that immigration judges are also setting bond in response to bond hearings ordered by that court. *See, e.g.*, *Lemine v. Kurzdorfer*, W.D.N.Y. 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). These examples are numerous but not exhaustive. However, these

examples belie the citationless assertion in the Petition that immigration judges are not entertaining bond hearings or issuing bond decisions in immigration courts. In some 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 ordered, there is no evidence that Petitioner would be denied a bond hearing if one is ordered. Likewise, there is no evidence that the bond hearing would not be handled appropriately (an argument that would need to be raised in the administrative process, in any event) if ordered.[3]

If the Court determines that Petitioner is entitled to any due process-based relief from detention under § 1225(b)(2)(A), the only appropriate remedy is a bond hearing before an Immigration Judge in the normal administrative course, during which the Immigration Judge can properly determine in the first instance whether Petitioner is a flight risk or danger to the community.

C. 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

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[3] The Petition cites *Matter of Yajure Hurtado*, 29 I. & N. Dec. 216 (BIA 2025), and a July 8, 2025, policy, which are the subject of active litigation—including an appeal and associated appellate stay motion practice. *Compare* Dkt. No. 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). *Maldonado Bautista* does not control for statutory interpretation because the decision incorrectly starts from the premise that detention authority flows from § 1226(a), which the Government denies. Nor does it control as to remedies for the reasons set forth in the Government's brief in *Perdomo Perez*. Katz Decl., Exh. "A", at 25–27.

proving entitlement to bond because § 1226(a) states, "[o]n a warrant issued by the Attorney General, an alien may be arrested" and a warrant was issued here. 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." Miller Decl., Exh. **"A"**, at 4.

D. 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, Petitioner should bear the burden of proof at any bond hearing. Section 1226 contemplates that any bond hearing *follows* detention, as opposed to preceding it. 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).[4] 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.").

Therefore, the remedy for failing to provide a bond hearing would be to grant a post-apprehension bond hearing as opposed to immediate release because the Government has the right to detain a Petitioner pending the outcome of a requested bond hearing (although Petitioner here does not allege she sought, or was refused, a bond hearing). Even if § 1226 governs Petitioner's detention, which the Federal Respondents deny, it is not a violation of § 1226(a) or due process to

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[4] And, of course, the ability to *ask for* a bond hearing does not equate to the entitlement to *receive release on bond.*

detain a Petitioner pending the outcome of a bond hearing.

For this same reason, if this Court grants a remedy to Petitioner here, it should not preclude "Respondents [from] re-detain[ing] Petitioner without a pre-deprivation hearing before this Court where the government bears the burden of justifying re-detention by clear and convincing evidence." This type of pre-detention relief is well beyond the scope of any relevant provision of the INA.

To the extent this Court finds § 1226(a) applies to Petitioner's detention, 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 elects to continue detention, 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).[5] 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*

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[5] Federal 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).

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

Indeed, placing the burden of proof on petitioners is consistent with the allocation of burdens within removal proceedings, where the Government bears the initial burden of establishing removability, but the alien bears the burden of establishing eligibility for any relief from removal. 8 U.S.C. § 1229a(c); 8 C.F.R. § 1240.8. The immigration judge's decision is appealable to the Board of Immigration Appeals. 8 C.F.R. § 1236.1(d)(3). Deviating from that standard practice is not warranted here even if detention is governed by § 1226(a) considering the warrant issued before Petitioner's arrest and the fact that placing the burden on the Petitioner comports with administrative practice in those circumstances.

Here, if 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, (2) Petitioner had only been detained for approximately two weeks at the time she commenced suit, and (3) Petitioner does not allege she sought, or was denied, a bond hearing. Indeed, that result adhered in *Bravo Perez*, where likewise a Petitioner was arrested and a warrant existed: Federal 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. No. 10 at 2.

Moreover, if Petitioner is ordered released, she could be re-detained on a different basis: she admitted that she violated the terms of her order of release on recognizance by obtaining employment without authorization. *Compare* Miller Decl., Exh. **"A"** at 13, 3 (admitting violation), *with* 8 C.F.R. § 236.1(c)(9) ("When an alien who, having been arrested and taken into custody, has been released, such release may be revoked at any time in the discretion of the district director, acting district director, deputy district director, assistant district director for investigations, assistant district director for detention and deportation, or officer in charge (except foreign), in which event the alien may be taken into physical custody and detained.").

E. If This Court Finds § 1226(a) Applies to Petitioner's Detention, it Should Not Order Immediate Release or a Burden-Shifted Hearing.

Petitioner is not entitled to immediate release given on the facts of this case and because immediate release would not be available to her 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 alien, the only process due to Petitioner under the Constitution is that which Congress designates for the alien under 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.").

The facts of this case do not support shifting the burden here. As the Petition appears to acknowledge, courts that have shifted the burden to the Government have done so when faced with detention longer than a six-month period. Dkt. No. 1 ¶¶ 45, 46. The Second Circuit addressed issue

in *Velasco Lopez v. Decker*, 978 F.3d 842, 851 (2d Cir. 2020).[6] 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 she had not been detained for six months, or even one month, when she commenced suit. 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 a 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).

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

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[6] 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).

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).[7] 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, when faced with the same requests for relief in *Bravo Perez*, this Court did not order either one; rather, it ordered a bond hearing without shifting the burden. *Compare Bravo Perez*, No. 9:26-cv-00205 (ECC), Dkt. No. 1, *with Bravo Perez*, No. 9:26-cv-00205 (ECC), Dkt. No. 10 at 2.

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 the right to have

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[7] 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 [the] 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)).

the chance to be released on bond insofar as a warrant was issued for Petitioner's arrest. Invoking that interest, however, does not end the inquiry, especially where Petitioner has been detained for a limited period of time and has not requested or been denied a bond hearing. 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 she is subject to removal proceedings and does not claim she was lawfully admitted or paroled to the United States. 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 she has a pending asylum application. But Petitioner does not—and cannot—invoke any purported right to be free from detention or removal merely because an unlawfully present alien has a pending asylum application. *See* 8 U.S.C. § 1158(c)(1) (noting it is the granting of asylum status, not the filing of the application, that affects removal); 8 C.F.R. § 202.22 (same); *Abouelmagd v. Semeniuk*, No. 25-CV-4402 (OEM) (RML), 2025 WL 3145056 (E.D.N.Y. Nov. 10, 2025) (citing application: "[h]aving a pending asylum application with USCIS . . . does not preclude ICE or CBP from placing you in removal proceedings." (cleaned up)). Finally, Petitioner may be detained only while removal proceedings are pending. *See Demore*, 538 U.S. at 528 (finding a significant due process consideration to be that detention has a "definite termination point"). Also, Petitioner was detained for only 13 days when she commenced suit and, so far, has been detained for only 16 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—about one-thirtieth of the fifteen-month detention period in *Velasco Lopez*—significantly diminishes the weight that should be afforded to the first *Mathews* factor.

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

Petitioner has not established these 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 that because 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, has not demonstrated that she 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). 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 just less than two weeks after Petitioner's arrest. If a bond hearing is ordered, it will occur months earlier than when it was ordered 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, Federal 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 6, 2026

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