UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CESAR VARELA PALLO,

Petitioner,

v. 1:26-cv-01363-MAV

PHILIP RHONEY, In his official capacity as Acting Field Office Director, Buffalo Field Office, Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security;

MICHAEL BALL, in his official capacity as Acting Deputy Field Office Director, Buffalo Field Office, U.S. Immigration and Customs Enforcement;

MARKWAYNE MULLIN, In his official capacity as Secretary of Homeland Security;

TODD BLANCHE, In his official capacity as Attorney General,

Respondents.[1]

RESPONSE TO ORDER TO SHOW CAUSE

The legal issues presented in the Petition for Writ of Habeas Corpus concern the U.S. Immigration and Customs Enforcement's ("ICE") detention of Petitioner Cesar Varela Pallo ("Petitioner") pursuant to 8 U.S.C. § 1225(b)(2). While reserving all rights, including the right to appeal, Respondents submit this response to the order to show cause in lieu of an

[1] The caption has been updated automatically pursuant to Federal Rule of Civil Procedure 25(d) and the titles of Respondents have been corrected where needed.

exhaustive responsive memorandum as has been previously filed, in order to preserve the legal issues and to conserve judicial and party resources.

Respondents acknowledge that on April 28, 2026, the U.S. Court of Appeals for the Second Circuit held that "Section 1225(b)(2)(A) does not apply to such noncitizens, who are present in the United States after entering the country without inspection and admission, and who were not apprehended while entering the country or shortly thereafter." *Barbosa Da Cunha v. Freden*, 175 F.4th 61, 69 (2d Cir. 2026). Rather, the court ruled, Section 1226(a) applies. Respondents therefore respectfully acknowledge that *Barbosa Da Cunha* controls and would lead this Court to grant the petition. For purposes of a potential future appeal in the event *Barbosa Da Cunha* is vacated, stayed, or overruled, Respondents respectfully preserve their arguments that Section 1225(b)(2)(A) applies.

Nonetheless, the appropriate remedy here is to order a bond hearing with the burden of proof on Petitioner, and not to immediately release him. As ordered by this Court in underlying matter, and affirmed by the Second Circuit, the proper remedy upon granting the petition is to order a bond hearing at which the alien bears the burden of proof. *Barbosa Da Cunha v. Freden*, No. 25-CV-6532-MAV, 2025 WL 3280575, at *7 (W.D.N.Y. Nov. 25, 2025), *aff'd sub nom. Barbosa Da Cunha v. Freden*, 175 F.4th 61, 69 (2d Cir. 2026) ("Thus, the Court finds that Petitioner was detained under § 1226(a), and not subject to mandatory detention under § 1225(b)(2). As such, he is entitled to a bond hearing 'at the outset of detention' as established by existing federal regulations.").

Should the Court prefer to receive a more exhaustive and fulsome opposition brief, Respondents respectfully request leave to file such a brief and will do so upon the Court's request.

ARGUMENT

In the Prayer for Relief, Petitioner seeks an order enjoining his transfer outside of the Western District of New York and ordering his immediate release or else a bond hearing. Petitioner argues that his detention is governed by 8 U.S.C. § 1226, that he is being unlawfully detained and deprive of a bond hearing, and that his detention violates the Fifth Amendment to the United States Constitution and 8 U.S.C. § 1226.

First, Respondents re-raise any and all jurisdictional defenses to this Petition, including that the Immigration and Nationality Act ("INA") strips this Court of jurisdiction over the claims raised, pursuant to 8 U.S.C. § 1252.

Substantively, Respondents contend that Petitioner's detention is governed by 8 U.S.C. § 1225, because, as an alien who entered without inspection or parole, he was and remains an applicant for admission. As such, he is subject to mandatory detention and not entitled to a bond hearing. Respondents further contend that Petitioner should be required to exhaust his administrative remedies as a prudential matter before bringing a habeas challenge in federal court, to the extent he has not done so.

Respondents further rely upon *In re Matter of Yajure Hurtado*, 29 I&N Dec. 216 (B.I.A. 2025). There, the Board of Immigration Appeals ("BIA") examined the plain language of § 1225, the INA's statutory scheme, Supreme Court and BIA precedent, the legislative history of the INA and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub L. No. 104-208, and DHS's prior practices. After doing so, the BIA held that "under a plain language reading of section 235(b)(2)(A) of the INA, 8 U.S.C. § 1225(b)(2)(A), immigration judges lack authority to hear bond requests or to grant bond to

aliens, like the respondent, who are present in the United States without admission." 29 I&N Dec. at 225. This Court should rule the same.

Respondents acknowledge that questions of law in this case, and the challenges to the government's policy and practice, substantially overlap with those at issue in *Barbosa Da Cunha*. Accordingly, while preserving all rights, Respondents incorporate by reference the legal arguments presented in that case. However, those arguments were disagreed with by *Barbosa Da Cunha*. Because of this, Respondents submit that further briefing or oral argument on the legal issues addressed in those cases would not be a good use of judicial or party resources. In its current posture, the Court can decide this matter without delay. If, however, the Court prefers to receive a formal and exhaustive opposition brief in this matter, Respondents will provide such a brief upon the Court's request.

Further, Respondents contend that should this Court determine that Petitioner's detention is subject to 8 U.S.C. § 1226, the only appropriate remedy is a bond hearing before an immigration judge, during which an immigration judge can properly determine in the first instance whether Petitioner is a flight risk or danger to the community. At any bond hearing, Petitioner should bear the burden of proof to show that he is neither a flight risk nor a danger to the community for many reasons. As this Court recently held, the Third, Fourth, Eighth (in dicta), and Ninth Circuits all hold that the burden at the initial bond hearing, held shortly after an alien is taken into detention, should remain on the alien. *Mahmodi v. Marich,* No. 25-CV-6762-MAV, 2026 WL 113473, at *6 (W.D.N.Y. Jan. 15, 2026). Additionally, in performing an analysis under the *Mathews v. Eldridge*, 424 U.S. 319 (1976) framework, this Court held that an alien detained for a short period at the Buffalo Federal Detention Facility does not have their due process rights violated by bearing the burden at an initial bond

hearing. *Id.* at *7-10. This Court's holding is supported by a number of arguments.

First, the Attorney General is granted broad discretion over bond decisions. *See* 8 U.S.C. § 1226(a)(1)-(2) (Attorney General "may continue to detain the arrested alien" and "may release" the alien on bond); *Reno v. Flores*, 507 U.S. 292, 294-95 (1993) ("Congress has given the Attorney General broad discretion to determine whether, and on what terms, an alien arrested on suspicion of being deportable should be released pending the deportation hearing.").

Second, the Supreme Court's recent decision in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018) rejects any argument that § 1226(a) should be read to require the government to carry the burden of proof in a bond hearing under that section. In *Jennings*, the Court rejected the position that § 1226(a) required the Government to provide "periodic bond hearings every six months in which the Attorney General must prove by clear and convincing evidence that the alien's continued detention is necessary." 138 S. Ct. at 847. In rejecting that reading, the Court held: "Nothing in § 1226(a)'s text—which says only that the Attorney General 'may release' the alien 'on . . . bond'—even remotely supports the imposition of either of those requirements." *Id.* While the precise question presented in *Jennings* was not identical to the one here, the *Jennings* Court held that it is "clearly contrary" to § 1226(a) to require the government to bear the burden of proof to justify prolonged detention, 138 S. Ct. at 848, it follows that § 1226(a) (and due process) should not require more robust procedures here.

Lastly, in *Velasco Lopez*, the Second Circuit required the burden to be shifted at a bond hearing only *after* a finding that detention had become prolonged. *Velasco Lopez v. Decker*, 978 F.3d 842, 854 (2d Cir. 2020) ("We believe that individuals subject to prolonged detention under § 1226(a) must be afforded process in addition to that provided by the ordinary bail

hearing . . . ."). Thus, there is no basis to require such additional protection here, and Petitioner should bear the burden of proof at any bond hearing this Court orders.

In any event, should Petitioner's request to enjoin his transfer such request should be denied in all respects. Under the INA, ICE has the authority to arrange for places of detention of aliens. 8 U.S.C. § 1231(g)(1). Indeed, Justice Sotomayor has noted that the government regularly transfers detainees between facilities, sometimes multiple times. *Garland v. Aleman Gonzalez*, 596 U.S. 543, 570 (2022) (Sotomayor, J., concurring in the judgment in part and dissenting in part). Similarly, Justice Souter has noted that in the ordinary course of immigration detention, aliens may be transferred away from lawyers, witnesses, and evidence. *Demore v. Kim*, 538 U.S. 510, 554 (2003) (Souter, J., concurring in part and dissenting in part). Although a transfer may cause inconvenience to Petitioner, this is not reason enough to strip ICE of its legislatively authorized ability to house detainees where it sees fit.

Additionally, because jurisdiction has already vested upon the filing of the Petition there is no reason in this case for this Court to interfere with that authority. *See, e.g., Walker v. Searls,* No. 23-CV-140-LJV, 2024 WL 1735213, at *7 (W.D.N.Y. Apr. 23, 2024) ("In other words, regardless of where Walker is housed, this Court retains jurisdiction over his habeas petition. So there is no need to interfere with DHS's authority to "arrange for appropriate places of detention" under 8 U.S.C. § 1231(g)(1), and Walker's motion to prevent his transfer is denied."); *Shaikh v. Barr*, No. 20-CV-6300 CJS, 2020 WL 7021443, at *3 (W.D.N.Y. Nov. 30, 2020) (same). Indeed, "[t]he Second Circuit has characterized the decision of where to house an immigration detainee under § 1231(g) as discretionary. *See Wood v. United States*, 175 F. App'x 419, 420 (2d Cir. 2006). Accordingly, absent a constitutional violation that the Court

has the inherent authority to remedy, the Court lacks the authority to review the Secretary of Homeland Security's decisions regarding the place in which Petitioner is detained." *Hassoun v. Searls*, 453 F. Supp. 3d 612, 620 (W.D.N.Y. 2020).

CONCLUSION

Respondents thank the Court for its consideration of this abbreviated submission and respectfully request that the Court deny the Petition.

Respectfully submitted,

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