UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

RUMEYSA OZTURK,

Petitioner,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, PATRICIA HYDE, Field Office Director, MICHAEL KROL, HSI New England Special Agent in Charge, TODD LYONS, Acting Director, U.S. Immigration and Customs Enforcement, and KRISTI NOEM, Secretary of Homeland Security; and MARCO RUBIO, in his official capacity as Secretary of State

Respondents.

No. 2:25-cv-374

RESPONDENTS' SUPPLEMENTAL BRIEFING RELATING TO THE QUESTION OF BAIL

A. <u>The Court Lacks Authority to Order Petitioner's Release.</u>

Petitioner seeks an Order that she be immediately released. ECF No. 12, at 22. As explained in Respondent's Supplemental Opposition to Petitioner's Amended Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241, the Court lacks habeas jurisdiction to consider the Petition. It is therefore also without power to provide this relief. Furthermore, under well-settled precedent, the detention of an alien during removal proceedings is "a constitutionally valid aspect of the deportation process." *Demore v. Kim,* 538 U.S. 510, 523 (2003) (quoting *Reno v. Flores*, 507 U.S. 292, 306 (1993)).

To be sure, where a district court does exercise habeas jurisdiction, it may have the inherent power to release the petitioner pending determination of the merits. *Mapp v. Reno,* 241 F.3d 221,

226 (2d Cir. 2001). Any such power, however, "is a limited one, to be exercised in special cases only." *Id.* Furthermore, "the standard for bail pending habeas litigation is a difficult one to meet: The petitioner must demonstrate that the habeas petition raises substantial claims and that extraordinary circumstances exist that make the grant of bail necessary to make the habeas remedy effective." *Id.* (brackets omitted) (quoting *Grune v. Coughlin,* 913 F.2d 41, 43-44 (2d Cir. 1990)).

But the viability of *Mapp* relief in this context is in doubt. The case was decided in 2001, before the REAL ID Act, and involved an alien challenging his deportation proceedings, but not the validity of his detention, through a district court habeas petition. Prior to passage of the REAL ID Act of 2005, aliens could seek review of their removal orders through the filing of a habeas petition in federal district court. *See, e.g., INS v. St. Cyr,* 533 U.S. 289, 311–14 (2001). The REAL ID Act removed habeas as a permissible avenue for challenging a removal order, stripped district courts of jurisdiction to review removal orders, and vested the courts of appeals with exclusive jurisdiction to review challenges to final removal orders. See 8 U.S.C. § 1252(a)(5). The Second Circuit recognized that it cannot override a statute to grant relief. *Mapp,* 241 F.3d at 227–29. Because a statute applies here, *Mapp* cannot create authority that is otherwise limited by statute.

Further, in *Mapp,* the Court qualified its holding that there is inherent authority to admit habeas petitioners to bail, as subject to limits imposed by Congress. *Mapp*, 241 F.3d at 223 (noting "that this authority may well be subject to appropriate limits imposed by Congress"). "[I]n cases involving challenges to [ICE] detention, Congress's plenary power over immigration matters renders this authority readily subject to congressional limitation." *Id*. at 231. No such limitation was at issue in *Mapp*, but here 8 U.S.C. § 1226(e) is an "express statutory constraint[]" that limits the Court's authority in this context. *Mapp*, 241 F.3d at 231.

Section 1226(e) restricts this Court's authority in two ways. First, Section 1226(e) provides a "clear direction from Congress," *Mapp*, 241 F.3d at 227, that "[n]o court may set aside any action or decision by [ICE] under [§ 1226] regarding the detention or release of any alien," 8 U.S.C. § 1226(e).[1] Thus, this Court lacks authority to grant interim release to a habeas petitioner who is subject to detention under § 1226(a). Second, ICE's discretionary decision to detain the petitioner cannot readily be set aside through a *Mapp* motion. As the Second Circuit explained, where Congress provided for discretionary detention, federal courts may be further constrained from granting release on bail where the agency has exercised such discretion. *See Mapp*, 241 F.3d at 229 n.12 ("[W]hile it may be the case that had the INS exercised its discretion under § 1231(a)(6) and decided not to release Mapp on bail, we would be required to defer to its decision, where there has been no such consideration of a detainee's fitness for release, deference to the INS . . . is not warranted."); see also *Cinquemani v. Ashcroft*, 2001 WL 939664, at *6–8 & n.6 (E.D.N.Y. Aug. 16, 2001).

It is perhaps for this reason – to avoid the appearance she is asking for improper judicial review of a bail determination – that, as of this writing, Petitioner has not requested a bond hearing before the immigration judge. Such a hearing is readily available.[2]

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[1] This is not to say that district courts lack jurisdiction at all over the release of an alien in immigration habeas proceedings, but under the circumstances here, that authority may be exercised only at the conclusion of the habeas case and upon a merits determination that the petitioner's detention is unlawful.

[2] For individuals, like Petitioner, detained pursuant to § 1226(a), the government may detain the alien for the duration of the removal proceedings or release the alien "on bond of at least $1,500" or conditional parole. See § 1226(a)(1)-(2). Per regulations, to be eligible for bond or conditional parole, the alien "must demonstrate to the satisfaction of the [decision maker] 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). When an alien is taken into ICE custody under § 1226(a), an ICE official makes an initial custody determination, including the setting of a bond. See 8 C.F.R. §§ 236.1(c)(8), 236.1(d)(1). An ICE officer may "in the officer's discretion, release

The immigration judge ("IJ") may continue detention of the alien or release the alien on bond or conditional parole. 8 U.S.C. § 1226(a); 8 C.F.R. § 1236.1(d)(1). However, the alien does not have any right to release on bond. *Matter of D-J-*, 23 I&N Dec. 572, 575 (AG 2003); *Matter of Guerra*, 24 I. & N. Dec. 37, 39 (BIA 2006). IJs have broad discretion in deciding whether to release an alien on bond. *Guerra*, 24 I. & N. Dec. at 39. IJs consider multiple discretionary factors, including any information that the IJ may deem to be relevant. Id. at 40. These factors include: (1) whether the alien has a fixed address in the United States; (2) the alien's length of residence in the United States; (3) the alien's family ties in the United States; (4) the alien's employment history; (5) the alien's record of appearance in court; (6) the alien's criminal record, including the extensiveness of criminal activity, time since such activity, and the seriousness of the offenses; (7) the alien's history of immigration violations; (8) any attempts by the alien to flee prosecution or otherwise escape authorities; and (9) the alien's manner of entry to the United States. Id. These factors are nonexclusive and the IJ has "broad discretion in deciding the factors [they] may consider in custody redeterminations . . . and may give greater weight to one factor over others as long as the decision is reasonable." *Id.* Further, *Guerra* establishes the INA in no way "limit[s] the discretionary factors that may be considered" in bond determinations. 24 I. & N. Dec. at 39; see also 8 C.F.R. § 1003.19(d) (the regulations provide that "[t]he determination of the Immigration Judge as to custody status or bond may be based upon any information that is available to the Immigration Judge or that is presented to him or her by the [alien] or [ICE].").

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a alien" provided that the alien demonstrates 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. § 236.1(c)(8). If ICE determines that an alien should remain detained during the pendency of his removal proceedings, the noncitizen may request a custody redetermination hearing (colloquially called a "bond hearing") before an IJ. See 8 C.F.R. §§ 236.1(d), 1003.19, 1236.1(d).

An alien may request a second bond redetermination hearing before the IJ, but the hearing will only be granted based on a showing that the alien's circumstances have materially changed since the first bond redetermination hearing. *See* 8 C.F.R. § 1003.19(e). Further, even if an alien does not request a second bond redetermination hearing, the alien may seek further administrative review of a bond redetermination before the BIA at any time before a final order of removal. 8 C.F.R. §§ 1003.1(b)(7), 1003.19(f), 1003.38, 1236.1(d)(3).

But, as noted above, the "discretionary judgment . . . regarding the detention or release of any [alien] or the grant, revocation, or denial of bond or parole" is not reviewable by the courts. 8 U.S.C. § 1226(e). As determined by the Supreme Court, that statute precludes an alien from "challeng[ing] a 'discretionary judgment' by the Attorney General or a 'decision' that the Attorney General has made regarding his detention or release." *Jennings*, 583 U.S. at 295 (quoting *Demore*, 538 U.S. at 516); *see also Hechavarria v. Whitaker,* 358 F.Supp.3d 227, 235 (W.D.N.Y. 2019) ("This provision 'precludes an alien from "challenging a discretionary judgment by the Attorney General or a decision that the Attorney General has made regarding his detention or release."'") (quoting *Jennings*); *Negusie v. Holder*, 555 U.S. 511, 517 (2009) (acknowledging that "[j]udicial deference" "is of special importance" where Congress has provided the Attorney General with discretion in making immigration decisions); *Sukwanputra v. Gonzales*, 434 F.3d 627, 632-33 (3d Cir. 2006) ("[t]he power to expel [noncitizens], being essentially a power of the political branches of government . . . may be exercised entirely through executive officers, with such opportunity for judicial review of their action as congress may see fit to authorize or permit").

Similarly, 8 U.S.C. § 1252(a)(2)(B)(ii) bars judicial review of discretionary decisions including bond determinations under § 1226(a):

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision . . . regardless of

> whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review . . . any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

§ 1252(a)(2)(B)(ii). Courts are precluded under § 1252(a)(2)(B)(ii) from reviewing any "decision or action" that is committed to the agency's discretion by statute. *See Kucana v. Holder*, 558 U.S. 233, 241-52 (2009). The "key to [section] 1252(a)(2)(B)(ii) lies in its requirement that the discretion giving rise to the jurisdictional bar must be specified by statute, and that whether such a specification has been made is determined by examining the statute as a whole." *Jilin Pharm. USA, Inc. v. Chertoff*, 447 F.3d 196, 200 (3d Cir. 2006) (internal quotations omitted).

B. Petitioner Cannot Meet *Mapp's* Difficult Standard for Release.

If the Court is to consider Petitioner's release pending the determination of this proceeding, under *Mapp*, she must "demonstrate that the habeas petition raises substantial claims and that extraordinary circumstances exist that make the grant of bail necessary to make the habeas remedy effective." *Mapp,* 241 F.3d at 226. Petitioner cannot make this showing.

First, her detention is patently not unlawful. She is a non-citizen. Her visa has been revoked. Removal proceedings have been commenced. And she has been detained during the pendency of those proceedings, with the opportunity to seek bond before the immigration judge. All of her challenges are subject to Article III judicial review.

Second, she cannot show extraordinary circumstances that make the grant of bail necessary to make the habeas remedy effective. *Id.* at 230. While recognizing the seriousness of being detained, release must be for a reason other than the Petitioner's convenience. *See Elkimya v. Dep't of Homeland Sec.,* 484 F.3d 151, 154 (2d Cir. 2007) ("We see no reason, and Elkimya has proffered none other than convenience, why his continued detention by the INS would affect this Court's

ultimate consideration of the legal issues presented in his petition for review.") Furthermore, Petitioner does not offer a health-related reason that rises to the level of extraordinary, tantamount to the worst of the COVID-19 crises. In *Graham v. Decker,* 454 F. Supp. 3d 347, 358 (S.D.N.Y. 2020), for example, the Court recognized that the COVID-19 pandemic was extraordinary and affected the Petitioner personally. But release was denied because he failed to demonstrate "that he personally faces a heightened risk of complications or that the conditions and procedures in place at the OCCF are constitutionally deficient. The Court therefore denies his application for bail brought pursuant to Mapp."

As noted previously, Petitioner's asthmatic condition and her desire to speak freely and openly does not represent exceptional circumstances as her concerns are likely common to all detainees experiencing limits on freedom and she does not demonstrate that her circumstances make the grant of bail necessary at this time. And, as noted, shed can also seek a bond hearing with the Immigration Judge. Accordingly, the Court must decline Petitioner's request for interim release during the pendency of this action.

Finally, some courts in this circuit exercise habeas jurisdiction under § 2241 when the duration of a person's immigration detention begins to raise substantive due process concerns. *See, e.g., Black v. Decker,* 2020 WL 4260994 (S.D.N.Y. July 23, 2020). Under these cases, even aliens subject to mandatory immigration detention "are entitled to individualized determinations as to their risk of flight and dangerousness when their continued detention becomes unreasonable and unjustified." *Id.* at *7 (citation omitted). But in this context, relief provided is for ICE to provide the petitioner an individualized bond hearing, where arguments for and against continued detention should be made. *Id.* at *9 & n.9. Petitioner here has such a hearing available to her but to date has not requested one.

CONCLUSION

For the above reasons, this Court should not order the release of Petitioner.

Respectfully submitted,

Dated: April 10, 2025

By: */s/ Michael P. Drescher*
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