IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

RÜMEYSA ÖZTÜRK,
Petitioner

v. No. 2:25-cv-00374

DONALD J. TRUMP, et al.,
Respondents

PETITIONER'S REPLY REGARDING REQUEST FOR PRODUCTION OF MEMORANDA

Petitioner Rümeysa Öztürk hereby submits the following memorandum in further support of her request for two documents described in the Court's recent opinion as "important to the resolution of both [her] request for bail and a final determination" on her habeas petition. ECF 104 at 63-64; *see* ECF 99 at 5. As described in an April 13, 2025, *Washington Post* article, those documents are: (1) a memorandum sent "from senior DHS official Andre Watson to senior State Department official John Armstrong" before Ms. Öztürk's detention stating that "ÖZTÜRK engaged in anti-Israel activism in the wake of the Hamas terrorist attacks on Israelis on October 7, 2023,"—"specifically," that she "co-authored an Op-ed article" that "called for Tufts to 'disclose its investments and divest from companies with direct or indirect ties to Israel'"; and (2) a March 2025 memorandum from an office within the U.S. Department of State which "determined that the Trump administration had not produced any evidence showing that she engaged in antisemitic activities or made public statements supporting a terrorist organization, as the government has alleged." John Hudson, *No Evidence Linking Tufts Student to Antisemitism or Terrorism, State Dept. Office* Found, Wash. Post (Apr. 13, 2025), https://wapo.st/43YyIll (ECF 95-1).

On April 15, 2025, Ms. Öztürk's counsel requested that the government produce these two documents which were relevant to both her request for bail and her habeas petition. ECF 99 at 5. The government denied this request, citing the deliberative process privilege, and indicating that it would oppose Ms. Öztürk's request that this Court order the production of the documents. *Id.* Indeed, the government did file an opposition, citing 8 U.S.C. § 1202(f) as the basis for withholding the records described in the *Post* article and arguing that the records were not necessary for resolution of Ms. Öztürk's petition. *See* ECF 103 at 5-6. Because these records contain facts central to the basis for her detention, and because Respondents do not and cannot establish that any privilege applies, Ms. Öztürk submits this reply to ensure that the memoranda are produced by this Court's May 2, 2025, deadline to present all evidence related to the issue of bail. *See* ECF 104 at 73-74.

ARGUMENT

The Court has already "highlight[ed] the importance of identifying the motive for [Ms. Öztürk's] detention." ECF 104 at 56. Per the *Post*'s report, the DHS and DOS records are highly relevant to that motive, and support Ms. Öztürk's habeas petition and her claim that release is warranted under both prongs of the *Mapp* inquiry. *See* ECF 82-1 at 9. The DHS and DOS records are relevant to the First Amendment claim because they illustrate "the connection between Ms. Öztürk's speech and her detention" and any "justifications for the government's actions adverse to Ms. Öztürk." *Id.* at 56–57; *id.* at 50; *contra* ECF 103 at 6. The records are also relevant to Ms. Öztürk's due process claim insofar as they go to her "claims that her detention is improperly motivated," *i.e.*, imposed for a punitive purpose. ECF 104 at 62. Not only do the records demonstrate that Ms. Öztürk raises "substantial claims," but also that this case presents

"extraordinary circumstances," *see id.* at 15, owing to the government's highly irregular and improper course of action and misconduct in this case, *see id.* at 17–20.

I. 8 U.S.C. § 1202(f) Does Not Bar Production of DHS or DOS Records.

8 U.S.C. § 1202(f) does not bar production of the DHS or DOS records. The section reads:

> **(f) Confidential nature of records.** The records of the Department of State and of diplomatic and consular offices of the United States pertaining to the issuance or refusal of visas or permits to enter the United States shall be considered confidential and shall be used only for the formulation, amendment, administration, or enforcement of the immigration, nationality, and other laws of the United States, except that—
>
> > **(1)** in the discretion of the Secretary of State certified copies of such records may be made available to a court which certifies that the information contained in such records is needed by the court in the interest of the ends of justice in a case pending before the court.

First, the **DHS records** fall outside of the statute and can be produced. The statute covers only "the records of the Department of State," not records of the Department of Homeland Security. 8 U.S.C. § 1202(f).

Second, the **DOS records** can be produced. Section 1202(f)(1) contemplates production of DOS records in circumstances like those here, where the court needs the DOS records for a pending case "in the interest of the ends of justice." Applying that standard, courts have ordered production of DOS records to a Ph.D. student challenging the revocation of her visa as a violation of her due process rights, *see Ibrahim v. Dep't of Homeland Sec.*, No. 06-cv-00545, 2013 WL 1703367, at *9 (N.D. Cal. Apr. 19, 2013), to a criminal defendant to permit him to defend against charges of bribing a consular officer, *see United States v. O'Keefe*, No. 06-CR-0249, 2007 WL 1239204, at *2 n.1 (D.D.C. Apr. 27, 2007) ("There can be no question that in a criminal case regarding the handling of requests within a consulate, consular records are 'needed by the Court in the interest of the ends of justice' within the meaning of this statute."), and to a

request from the parties in order to allow the district court to ascertain the basis of the defendants' determination that the plaintiff was inadmissible, *Tran v. Rice*, No. 06-cv-02697, 2007 WL 9776703, at *1 (S.D. Cal. May 1, 2007).

Here, the DOS records are needed "in the interest of the ends of justice" because they reveal the intention, motive, and purpose for the government's arrest and detention of Ms. Öztürk, and will further establish that the government violated Ms. Öztürk's constitutional rights. Colorable "constitutional claims challenging alleged government misconduct," like those here, "create[] a strong interest in accurate fact-finding for plaintiff and for society, and a strong interest in the enforcement of the constitutional protections asserted in plaintiff's complaint." *Ibrahim*, 2013 WL 1703367, at *9 (rejecting government's assertion of privilege under § 1202(f) and ordering production of visa revocation records). Secretary Rubio himself suggested that the § 1202(f)(1) standard could apply: "I would caution you against solely going off of what the media has been able to identify, and those presentations, if necessary, *will be made in court*." ECF 104 at 50 (emphasis added). Where nothing less than Ms. Öztürk's continuing physical detention turns on the basis of the government's actions—as contained in the DOS records—the interests of justice demand that all records related to the government's decision to detain her, including the DOS document identified by the *Post*, be produced.

Spadaro v. United States Customs & Border Prot., 978 F.3d 34 (2d Cir. 2020) (cited by the government in their filing, ECF 103 at 5), does not counsel otherwise. *Spadaro* held only that DOS records covered by 8 U.S.C. § 1202(f) could be withheld in response to a Freedom of Information Act request. 978 F.3d at 49. It did *not* hold that § 1202(f) barred production of DOS records in a pending habeas proceeding or civil litigation. Indeed, *Spadaro* noted that the "function" of § 1202(f)(1) "is to allow the DOS to disclose such documents in pending court

proceedings, separate and apart from a FOIA action, where the court certifies its need for such documents." *Id.* (citing *O'Keefe* and *Tran*). Ms. Öztürk has not brought a FOIA lawsuit, and her case falls squarely within the category of cases outlined in § 1202(f)(1) in which production is appropriate.

II. The Government's Oblique Reference to Deliberative Process Privilege Does Not Bar Production of the DHS or DOS Records.

The government's most recent filing does not argue that the deliberative process privilege bars production of the DHS and DOS records. *See* ECF 103. However, in case the government belatedly seeks to press this argument, Ms. Öztürk submits that this privilege does not prevent the production of the relevant records.

First, "[t]he assertion of the privilege by an attorney is [] improper." *National Council of La Raza v. Dep't of Justice* ("*NCLR*"), 411 F.3d 350, 356 (2d Cir. 2005). Instead, invocation of that privilege requires the head of DHS or the head of DOS, or a subordinate official properly delegated by regulation, to not only assert but provide substantive support for the claim of privilege. *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 643 F. Supp. 2d 439, 441 (S.D.N.Y. 2009). With no such invocation here, the privilege cannot attach.

Second, even if deliberative process privilege could be established here—though it cannot—it is a *qualified* privilege that must yield because the documents describe the basis for Ms. Öztürk's detention and reveal the decision-making process that is the subject of her claims. The "historical and overwhelming consensus and body of law within the Second Circuit is that when the decision-making process itself is the subject of the litigation, the deliberative process privilege cannot be a bar to discovery." *Child. First Found., Inc. v. Martinez*, No. 04-cv-0927, 2007 WL 4344915, at *7 (N.D.N.Y. Dec. 10, 2007) (collecting cases). Raising the same claims as plaintiffs in *Children First Foundation*, Ms. Öztürk challenges the process by which the

government detained her, claiming that it violated her First Amendment and due process rights. Because Ms. Öztürk's "cause of action is directed at the government's intent in rendering its policy decision and closely tied to the underlying litigation then the deliberative process privilege evaporates." *Id.* at *7. Courts have repeatedly rejected the privilege where the plaintiffs' challenge to the government's decision-making forms the heart of their constitutional and tort claims. *See, e.g., Lawrence v. Suffolk Cnty.*, No. 19-cv-2887, 2022 WL 855380, at *11 (E.D.N.Y. Mar. 23, 2022) (challenging prosecutor's decision to file criminal charges and underlying policies relating to *Brady* compliance); *Anilao v. Spota*, No. CV 10-32, 2015 WL 5793667, at *21 (E.D.N.Y. Sept. 30, 2015) ("The Plaintiffs' claims as to the violation of their First, Thirteenth and Fourteenth Amendment rights in connection with their prosecution, their assertions of the related municipal liability under *Monell,* the conspiracy to violate their constitutional rights, and their malicious prosecution and false arrest claims all place in issue the deliberative process of the County Defendants in prosecuting the Plaintiffs here."); *Burbar v. Inc. Vill. of Garden City*, 303 F.R.D. 9, 14 (E.D.N.Y. 2014) (denying deliberative process privilege where plaintiff claimed abuse of process and malicious prosecution).[1] This Court should do the same and ensure that Respondents produce the memoranda by this Court's May 2, 2025, deadline to present all evidence related to the issue of bail.

[1] *Children First Foundation* found that it was unnecessary to apply a balancing test between "the interest of the litigant and the public's need to know and the government's need to protect frank discussion and to prevent injury to the quality of the agency's decision." 2007 WL 4344915, at *8. None of the cases that "waived the privilege when the deliberative process was the subject matter of the litigation . . . engaged in the balancing test." *Id.* That balancing test was applied only where, unlike here, the "deliberative process was not pivotal to the litigation." *Id.*

CONCLUSION

Ms. Öztürk respectfully requests that the Court order Respondents to produce the following documents by May 2, 2025, consistent with the Court's April 18, 2025, Order (ECF 104): (1) the memorandum sent "from senior DHS official Andre Watson to senior State Department official John Armstrong" before Ms. Öztürk's detention; and (2) the March 2025 memorandum from an office within the U.S. Department of State which "determined that the Trump administration had not produced any evidence showing that she engaged in antisemitic activities or made public statements supporting a terrorist organization, as the government has alleged."

Respectfully submitted,

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Dated: April 23, 2025

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**Pro hac vice application forthcoming*
***Admitted to appear pro hac vice*