IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

P.L., *et al.*,

Plaintiffs,

v.

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *et al.*,

Defendants.

Civil Action No. 1:19-cv-01336-ALC

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF RULE 59(E) MOTION TO REINSTATE PLAINTIFFS' CLAIMS AS APPLIED TO BOND HEARINGS AND COUNT SIX

PRELIMINARY STATEMENT

On June 21, 2019, this Court issued an Opinion and Order denying Plaintiffs' motions for a preliminary injunction and class certification and granting Defendants' motion to dismiss on the basis that 8 U.S.C. § 1252(b)(9) bars jurisdiction over Plaintiffs' claims, concluding that "federal courts do not have jurisdiction over a claim challenging part of the process of removal proceedings." Dkt. No. 102 at 6. On this basis, the Court entered final judgment dismissing the matter on June 24, 2019. Dkt. No. 103. Pursuant to Fed. R. Civ. P. 59(e), Plaintiffs hereby move for alteration or amendment of the Court's Judgment on two bases.

First, Plaintiffs request that the Court reinstate Plaintiffs' claims as they relate to bond hearings. The Supreme Court has held that section 1252(b)(9) does not bar jurisdiction over claims challenging custody proceedings, including bond hearings. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 840 (2018) (holding that section 1252(b)(9) did not preclude review of whether "certain statutory provisions require detention without a bond hearing" because question of right to a bond hearing did not "'aris[e] from' the actions taken to remove these aliens").

Second, Plaintiffs request that the Court reinstate Count Six, Plaintiffs' Administrative Procedure Act ("APA") claim that Defendants' decision to implement the Refusal to Produce Policy ("Policy") was arbitrary and capricious.[1] It is undisputed that section 1252(b)(9) does not bar jurisdiction over the claims of the Organizational Plaintiffs, since they are not subject to removal proceedings and therefore have no alternative mechanism by which to seek review of their claims. Defendants do not contend otherwise. The APA claim also merits reinstatement for all plaintiffs for the additional reason that it challenges the Defendants' *decision-making process* in implementing the Refusal to Produce Policy (the "Policy") rather than the use of VTC

[1] Plaintiffs' arbitrary-and-capricious APA claim was asserted on behalf of both the organizational and individual plaintiffs.

in removal proceedings. Accordingly, Count Six is, by definition, outside the scope of section 1252(b)(9), as it does not "aris[e] from" removal proceedings.

Because the grant of the motion to dismiss does not address controlling law and facts establishing that section 1252(b)(9) does not bar jurisdiction over Plaintiffs' claims regarding custody and under the APA, Plaintiffs respectfully request that the Court reinstate Count Six and all other claims as they relate to bond hearings and grant Plaintiffs' motions for class certification and preliminary injunction, for the reasons set forth in Plaintiffs' briefing.

ARGUMENT

A Rule 59(e) motion may be granted: (1) "to prevent manifest injustice," (2) "to correct errors of law or fact," (3) where new evidence becomes available, or (4) where there is "an intervening change in controlling law." *Smith v. City of New York*, No. 12 Civ. 8131 (JGK), 2014 WL 2575778, at *2 (S.D.N.Y. June 9, 2014) (citing *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992)). The movant must "demonstrate that the Court overlooked 'controlling law or factual matters' that had been previously put before it." *Taylor v. Advent Product Development*, No. 19-CV-3570 (CM), 2019 WL 2281279, at *1 (S.D.N.Y. May 29, 2019) (quoting *R.F.M.A.S., Inc. v. Mimi So.*, 640 F. Supp. 2d 506, 509 (S.D.N.Y. 2009)); *see also Johnson v. Progressive Corp. Ins. Co.*, No. 19-CV-2902 (CM), 2019 WL 2314858, at *1 (S.D.N.Y. May 30, 2019) ("The standards governing Fed. R. Civ. P. 59(e) and Local Civil Rule 6.3 are the same."). The relevant information "must have been put before [the court] on [an] underlying motion," and, "had [it] been considered, might have reasonably altered the result before the court." *Salveson v. JP Morgan Chase & Co.*, 166 F. Supp. 3d 242, 249 (E.D.N.Y. 2016) (quoting *Henderson v. City of New York*, No. 05-CV-2588 (FB)(CLP), 2011 WL 5513228, at *1 (E.D.N.Y. Nov. 10, 2011).

I. THE COURT SHOULD REINSTATE PLAINTIFFS' CLAIMS AS THEY RELATE TO BOND HEARINGS

Plaintiffs' challenge to the use of VTC at bond hearings is not barred by section 1252(b)(9). The Court's dismissal of all claims was explicitly based on the conclusion that under section 1252(b)(9), "federal courts do not have jurisdiction over a claim challenging part of the process of removal proceedings." Dkt. No. 102 at 6. But this reasoning does not apply to claims challenging the use of VTC with respect to custody and detention proceedings (including bond hearings), because bond hearings are legally and factually distinct from removal proceedings and are not reviewable on petitions for review in federal court. *See* 8 U.S.C. § 1252 (providing for judicial review only of "orders of removal"). Defendants' use of VTC at bond hearings consistently leads to adverse determinations and prolonged detention for detained immigrants, as set forth in Plaintiffs' papers and at oral argument. *See, e.g.*, May 29, 2019 Hr'g Tr. (Dkt. No. 97) at 31:7-13 (discussing 37 failed attempts to connect via VTC that led to prolonged detention due to inability to hold bond hearing as a result of the Policy); Supp. Decl. of Leena Khandwala (Dkt. No. 83), ¶ 4 (all bond hearings conducted by VTC).

Bond hearings determine solely whether a noncitizen should be detained or at liberty during the pendency of his underlying removal proceedings. The decision made by an immigration judge at a bond hearing has no legal effect on the removal proceedings, *i.e.*, the process of adjudicating removability or applications for relief from removal. *See* 8 C.F.R. § 1003.19(d) ("Consideration by the Immigration Judge of an application or request of a respondent regarding custody or bond under this section *shall be separate and apart from, and shall form no part of, any deportation or removal hearing or proceeding*.") (emphasis added). Accordingly, challenges to detention procedures, including bond hearings—like those brought here—do not "aris[e] from" removal proceedings and, as a result, are not barred by section

1252(b)(9). Indeed, because bond hearings are "separate and apart from" removal proceedings, they are also not reviewable in a petition for review. Thus, to the extent the Court's determination relied on the ability for Plaintiffs to raise their claims in a petition for review, that reasoning is inapplicable to Plaintiffs' challenge to the use of VTC at bond hearings.

Indeed, the Supreme Court explained that challenges to bond hearings are independent of challenges to removal and thus are not barred by section 1252(b)(9). In *Jennings v. Rodriguez*, the plaintiffs challenged their detention during their immigration proceedings because they were not provided individualized bond hearings. 138 S. Ct. at 839. The Court concluded that the claims were not barred because the plaintiffs were "not even challenging any part of the process by which their removability will be determined." *Id.* at 841. The Court thus expressly carved out custody determinations as not "arising from" removal proceedings, and held that such challenges were not barred by section 1252(b)(9). *See id.* at 840-41.

Other courts applying this principle, including in this district, have similarly held that section 1252(b)(9) does not strip federal courts of jurisdiction over challenges to bond hearings. *See, e.g.*, *You, Xiu Qing v. Nielsen*, 321 F. Supp. 3d 451, 459 (S.D.N.Y. 2018) (section 1252(b)(9) does not preclude review "over challenges to detention that are independent of challenges to removal orders" (citing H.R. Conf. Rep. 109-72, 175 (2005))); *Michalski v. Decker*, 279 F. Supp. 3d 487, 494 (S.D.N.Y. 2018) ("Michalski cannot be challenging an order of removal for the common-sense reason that he is not yet subject to one. Consequently, because his challenge to the lawfulness of pre-removal detention cannot be connected to that which does not exist, § 1252 does not bar his petition." (citing 8 C.F.R. § 1003.19(d))); *Torres v. Decker*, 18-CV-10026 (VEC), 2018 WL 6649609, at *1 (S.D.N.Y. Dec. 19, 2018) (claim of due process violation as a result of improper bond determination not barred by section 1252(b)(9) under

Jennings); *Joseph v. Decker*, No. 18-CV-2640 (RA), 2018 WL 6075067, at *5 (S.D.N.Y. Nov. 21, 2018) (plaintiff's procedural due process claim regarding burden at bond hearing not barred by section 1252(b)(9)); *see also* Pls'. Rep. Mot. Class Cert. and Prelim. Inj. (Dkt. No. 80) at 4 (section 1252(b)(9) applies only to reviews of orders of removal (citing *Michalski*, 279 F. Supp. 3d at 493)). Here, too, the Court maintains jurisdiction over Plaintiffs' challenges to the use of VTC at bond hearings.

In their papers and at oral argument, Plaintiffs repeatedly explained how bond hearings are distinct from removal proceedings. *See, e.g.*, May 29, 2019 Hr'g Tr. (Dkt. No. 97) at 40:10-15 ("[T]here are bond and custody determinations which are not part of the removal determination. . . . [T]hose are not removal questions, those are separate questions . . . ."); *id.* at 9:3-7 ("The petition for review process does not provide any way to review claims of individuals who prevail in their removal proceeding, or any way to review custody determinations . . . ."); Pls.' Ltr. Mot. Opp. Mot. Dismiss (Dkt. No. 95) at 1 n.1 ("§ 1252(b)(9) . . . does not apply to claims related to custody . . . ."); Compl. (Dkt. No. 2), ¶ 27 & n.5 (Organizational Plaintiffs represent detained immigrants in bond hearings). However, in view of the government's briefing that sought to treat all immigration proceedings together, the Court did not address the legal and factual differences that render bond hearings exempt from section 1252(b)(9)'s jurisdictional bar. Therefore, Plaintiffs respectfully request that the Court alter or amend its judgment to reinstate Plaintiffs' claims as applied to bond hearings.

II. THE COURT SHOULD REINSTATE PLAINTIFFS' CLAIM UNDER THE ADMINISTRATIVE PROCEDURE ACT

The Court should also reinstate Count Six: Plaintiffs' arbitrary-and-capricious APA claim. Count Six asserts that Defendants' decision to implement VTC at all removal hearings was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law"

because it "reverses years of settled and well-considered practice without reasoned explanation and in contradiction to the evidence." Compl. (Dkt. No. 2), ¶¶ 233-39. This claim—which challenges the *decision-making process* regarding the Policy and not VTC itself—is not barred by section 1252(b)(9).

In granting Defendants' motion to dismiss, the Court observed that Plaintiffs may seek redress for their claims in "a BIA proceeding or . . . a petition for review" (Dkt. No. 102 at 8). But this reasoning does not and cannot apply to the Organizational Plaintiffs' claim that Defendants implemented the Policy in an arbitrary and capricious manner. The Organizational Plaintiffs have independent rights to challenge administrative decision-making under the APA, and Count Six, brought by, *inter alia*, the Organizational Plaintiffs (Compl. (Dkt. No. 2), ¶¶ 233-39), is just such a challenge. It is undisputed that the Organizational Plaintiffs will never have standing in a BIA appeal or petition for review to challenge Defendants' decision-making in establishing the Policy. As a result, section 1252(b)(9) cannot bar Count Six. *See Candra v. Cronen*, 361 F. Supp. 3d 148, 157 (D. Mass. 2019) (children's APA claims related to their father's removal proceedings not barred because "the Government has not explained how the Candra Children could assert their separate rights under the Constitution or APA in their father's removal proceedings"); *Inland Empire - Immigrant Youth Collective v. Nielsen*, No. EDCV 17-2048 PSG (SHKx), 2018 WL 4998230 at *14 (C.D. Cal. Apr. 19, 2018) (APA claims allowed to stand because section 1252(b)(9) "does not deprive district courts of jurisdiction where a claim could not have been litigated in removal proceedings"); *see also* Pls'. Opp. Ltr. Pre-Mot. Conf. (Dkt. No. 90) at 3 ("[T]he PFR process does not apply to . . . the claims of the organizational plaintiffs."); May 29, 2019 Hr'g Tr. (Dkt. No. 97) at 9:3-7 ("The petition for review process does not provide . . . any mechanism to review the claims of the organizational plaintiffs."). Indeed,

Defendants have never argued that section 1252(b)(9) deprives this Court of jurisdiction over Count Six.[2]

Moreover, Plaintiffs' challenge to the *decision-making process* that led to the Policy is similarly not barred by 1252(b)(9). Plaintiffs' claim that Defendants' decision to adopt the blanket Policy was arbitrary and capricious does not challenge any orders of removal and is independent from the impact of the Policy on removal proceedings. Accordingly, Count Six is not subject to section 1252(b)(9)'s jurisdictional bar, as it does not "aris[e] from" removal proceedings. Numerous courts have reached the same conclusion. *See Regents of the Univ. of California v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 494 (9th Cir. 2018) (rejecting Government argument that section 1252(b)(9) eliminated jurisdiction over claims that the decision to rescind the DACA program was arbitrary and capricious because the provision "appl[ies] only to those claims seeking judicial review of orders of removal." *Id.* at 504, n. 19; *see also, e.g.*, *Jennings*, 138 S. Ct. at 841 (section 1252(b)(9) does not bar jurisdiction where plaintiffs "are not asking for review of an order of removal; . . . challenging the decision to detain them in the first place or to seek removal; . . . [or] challenging any part of the process by which their removability will be determined"); *Torres v. U.S. Dep't of Homeland Sec.*, No. 17-CV-1840, 2017 WL 4340385, at *5 (S.D. Cal. Sept. 29, 2017) (section 1252(b)(9) does not bar jurisdiction where "Plaintiff brings a procedural challenge to termination of his DACA status [including under the APA], an issue independent from any removal proceedings"); *Inland*

[2] Indeed, the section of Defendants' Opposition setting forth their jurisdictional arguments under section 1252(b)(9) makes no mention whatsoever of Plaintiffs' APA claim. Dkt. No. 77 at 10-15. Instead, Defendants set forth separate arguments—in a separate section of their brief—claiming that Plaintiffs' APA claim was barred under sovereign immunity. *Id.* at 15-17. Sovereign immunity does not bar Plaintiffs' APA claim for the reasons set forth in Plaintiffs' Reply Memorandum. Dkt. No. 80 at 6.

Empire, 2018 WL 4998230, at *14 (same); *Medina v. U.S. Dep't of Homeland Sec.*, No. C17-0218 RSM, 2017 WL 5176720, at *6 (W.D. Wash. Nov. 8, 2017) (same); *Coyotl v. Kelly*, 261 F. Supp. 3d 1328, 1340 (N.D. Ga. 2017) (same); *see also* Pls'. Rep. Mot. Class Cert. and Prelim. Inj. (Dkt. No. 80) at 4 ("§ 1252(b)(9) is 'not aimed at consolidating claims arising from administrative actions unrelated to an order of removal' . . . .").

Because the Court has overlooked relevant controlling law and factual matters, Plaintiffs respectfully request that the Court amend its Judgment to reinstate Plaintiffs' arbitrary and capricious claim under the APA.

CONCLUSION

The Court should grant Plaintiffs' motions and alter or amend its Judgment to reinstate Count Six and Plaintiffs' claims as applied to bond hearings and grant Plaintiffs' motions for class certification and preliminary injunction, for the reasons set forth in Plaintiffs' briefing.

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Respectfully submitted,

/s/ Robert J. Gunther, Jr.

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