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

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

PRELIMINARY STATEMENT

More than a year ago, the Government implemented a policy that denies immigrants the ability to be present at their immigration court hearings (the "Policy" or "Refusal to Produce Policy"), including hearings at which immigration judges determine whether they are eligible for bond or must remain detained. The Government adopted the Policy in a process that was erratic and unreasonable – in short, it was arbitrary and capricious. Plaintiffs challenged the Policy, including as applied in bond proceedings, and its unreasonable and illegal implementation. In dismissing Plaintiffs' action in its entirety for lack of jurisdiction, the Court overlooked key aspects of Plaintiffs' claims. Under controlling authority, this Court has jurisdiction over those components of Plaintiffs' claims. As such, Plaintiffs respectfully ask the Court to reinstate the Administrative Procedure Act ("APA") claim and the claims as they relate to bond hearings to prevent manifest injustice. None of the Defendants' arguments counsel otherwise.

ARGUMENT

As Defendants rightly concede at the outset of their Opposition Brief ("Opp."), a Rule 59(e) motion may be properly granted to correct errors of law or fact. *See* Opp. at 1 (discussing "controlling legal or factual authority overlooked by th[e] Court"); *see also Smith v. City of New York*, No. 12 Civ. 1831 (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)). Similarly, a Rule 59(e) motion may be granted "to prevent manifest injustice." *Smith*, 2014 WL 2575778, at *2. Defendants' argument that Plaintiffs' Rule 59 motion must fail because it did not identify overlooked controlling authority misstates this standard and misses the point of Plaintiffs' motion. In fact, Plaintiffs' motion primarily focuses on key oversights in the Court's decision, which are properly correctable on a Rule 59 motion. Specifically, Plaintiffs identified three

material components of their claims that the Court overlooked in granting Defendants' motion to dismiss that should now be addressed to prevent manifest injustice.

First, Plaintiffs' APA claim challenges the arbitrary and capricious decision-making process that led Defendants to adopt the blanket Refusal to Produce Policy. Defendants seek, unsuccessfully, to recast the APA claim as a challenge to the use of VTC itself. But that is not Plaintiffs' claim. As Plaintiffs' Opening Brief ("Br.") made clear, the Court's Opinion overlooked the target of Plaintiffs' APA challenge: the decision-making process, not the outcome of the decision.

Second, the Organizational Plaintiffs will never have standing to bring an APA challenge at the Board of Immigration Appeals ("BIA") or through the petition for review process. Instead, the District Court is the *only* forum available for the Organizational Plaintiffs to assert their APA claim. The Court's statement that "Plaintiffs still have the ability to bring their claims in a BIA proceeding or to file a petition for review," Op. at 7-8, shows that the Organizational Plaintiffs' APA claims, in particular, were overlooked.

Third, bond hearings, and the records of those hearings, are distinct from removal proceedings. In *Jennings v. Rodriguez*, the Supreme Court specifically carved out challenges to bond proceedings from the scope of 8 U.S.C. § 1252(b)(9). 138 S. Ct. 830, 840-41 (2018). The Court's Opinion overlooked core aspects of *Jennings* and the distinction between bond and removal proceedings. Critically, and because of those distinctions, 8 U.S.C. § 1252(b)(9) does not deprive the Court of jurisdiction. But the Court did not acknowledge the distinction between Plaintiffs' bond-related claims and those arising from removal proceedings. To correct this oversight and prevent manifest injustice, the Court should grant Plaintiffs' Rule 59(e) motion.

I. THE COURT SHOULD REINSTATE PLAINTIFFS' ADMINISTRATIVE PROCEDURE ACT CLAIM

This Court overlooked Plaintiffs' APA claim, which challenges the process by which the Government decided to implement its Policy, not the Policy itself. In fact, the Court's Opinion did not discuss or appear to consider this claim at all, as evidenced by the Court's statement that *all* of Plaintiffs' claims may be brought in a BIA proceeding or in a petition for review, Dkt. No. 111 at 7-8. That statement is wrong with respect to the APA claim brought by the Organizational Plaintiffs, who lack standing in either forum. These errors confirm that Plaintiffs' APA claim should be reinstated.

Defendants' argument relating to section 1252(b)(9) as applied to Plaintiffs' APA claim is a straw man. As Plaintiffs' Opening Brief made clear, the APA claim challenges the process by which the *decision* to implement VTC at all proceedings was made; it does not challenge the "use of VTC" as Defendants suggest. Dkt. No. 111 at 12-13. Indeed, Defendants' argument ignores the purpose of an APA challenge, which "focuses on the agency's decision making *process*, not on the decision itself." *See, e.g.*, *NVE, Inc. v. Dep't of Health & Human Servs.*, 436 F.3d 182, 190 (3d Cir. 2006). Plaintiffs' claim plausibly alleges that this decision-making process occurred overnight, chaotically reversed "years of settled and well-considered practice," and conspicuously coincided with the current Administration's statement that immigrants who enter the United States without authorization should be deported without due process. Compl. ¶¶ 72, 78, 233-39. None of these facts "aris[e] from" a removal proceeding, and none were considered by the Court.

Further, *Delgado v. Quarantillo*, 643 F.3d 52 (2d Cir. 2011), relied on by the Government throughout its brief, is entirely unrelated to and does not deprive the Court of jurisdiction over Plaintiffs' APA claim. *Delgado*'s "substance of the relief" test offers no

support for the dismissal of Plaintiffs' APA claim, particularly as to the Organizational Plaintiffs. This Court's articulation of the test confirms this, explaining that the test bars jurisdiction "where *immigrants in removal proceedings* seek to directly or indirectly challenge removal orders or proceedings." Dkt. No. 102 at 5 (emphasis added). It is clear on its face that this test does not apply where relief is sought by parties, such as the Organizational Plaintiffs, that are not and can never be subject to removal proceedings. Moreover, because the APA claim challenges the decision-making process and not the use of the Refusal to Produce Policy itself, it does not challenge any removal orders or removal proceedings. Indeed, for the Organizational Plaintiffs, removal orders and removal proceedings are entirely inapplicable.

Defendants' effort to distinguish the DACA cases cited by Plaintiffs also fails. Defendants argue that the decision to terminate DACA benefits is "substantially more distant from removal proceedings than plaintiffs' present challenge." Defendants did not, however, identify any standard for determining what is sufficiently "distant" to be outside the ambit of section 1252(b)(9). Instead, Defendants again mischaracterize the APA claim as a challenge to the use of VTC itself. Dkt. No. 111 at 15. Contrary to Defendants' assertions, these cases are directly on point, as they stand for the proposition that section 1252(b)(9) does not bar challenges to a decision-making process that occurs separate from removal proceedings. *See, e.g.*, *Inland Empire - Immigrant Youth Collective v. Nielsen*, No. 17-cv-2048 (PSG) (SHKx), 2018 WL 4998230, at *14 (C.D. Cal. Apr. 19, 2018) (holding that section 1252(b)(9) did not bar challenges to the "*separate decision* to automatically terminate DACA as a consequence of" the commencement a removal proceeding (i.e., the issuance of a Notice to Appear) (emphasis added)). The fact that Defendants "respectfully disagree[]" with the non-DACA case cited by

Plaintiffs, *Candra v. Cronen*, 361 F. Supp. 3d 148 (D. Mass. 2019), confirms that decision also supports Plaintiffs' arguments. Dkt. No. 111 at 15.

Defendants' brief addresses the APA claim as applied to the Organizational Plaintiffs only in passing, focusing instead on the claims brought by individual Plaintiffs. *See, e.g.*, Opp. at 12 ("[P]laintiffs in the present matter have challenged . . . an aspect of *their* removal proceedings." (emphasis added)); *id.* at 15 ("Plaintiffs' challenge here is entirely about the circumstances of how *their* removal proceedings are conducted." (emphasis added)). Indeed, Defendants offer no purported justification for dismissing the Organizational Plaintiffs' APA claim beyond asserting that the claim is somehow "derivative of their clients' claims." Opp. at 15. But this argument is factually and legally incorrect.

Despite Defendants' suggestion, the Organizational Plaintiffs are not raising their APA claim on behalf of their clients. Instead, they are asserting the claim to vindicate their own rights and to seek redress for their own injuries, and thus this claim is not "derivative" of their clients' claims. Dkt. No. 95 at 2-3 (explaining that the Organizational Plaintiffs have independent standing to assert an APA claim); *see also De Dandrade v. United States Dep't of Homeland Sec.*, 367 F. Supp. 3d 174, 181 (S.D.N.Y. 2019) ("An organization can have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy." (internal quotations omitted)). The Organizational Plaintiffs bring their claim because they too have been adversely affected by the Government's Refusal to Produce Policy, and there is strong evidence that that the Policy was implemented without

consideration as to how it would affect the workings of the immigration system and the Organizational Plaintiffs who provide services within that system. Compl. ¶¶ 72, 78, 233-39.[1]

Defendants also argue that they "consistently ha[ve] demonstrated throughout this litigation [that] plaintiffs are not without a judicial forum for their claims." Opp. at 10. This is false. As explained above, the Organizational Plaintiffs have no other forum in which to bring their APA claim. This is a key fact that the Court overlooked when it concluded that "Plaintiffs still have the ability to bring their claims in a BIA proceeding or to file a petition for review." Dkt. No. 102 at 7-8. Because the Court overlooked the APA claim in its entirety, and facts about the Organizational Plaintiffs specifically, and the inapplicability of section 1252(b)(9) thereto, Plaintiffs' APA claim should be reinstated.

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

Despite Defendants' contentions to the contrary, Plaintiffs' claims have always included challenges to Defendants' blanket use of VTC in bond hearings, which are factually and legally distinct from removal proceedings. Indeed, Defendants do not and cannot dispute that (1) section 1252 applies only to "orders of removal," (2) bond hearings are legally distinct from removal proceedings, and (3) courts have repeatedly held that section 1252(b)(9) does not bar

[1] As a factual matter, the record is clear that Defendants' Policy has harmed the Organizational Plaintiffs in a manner that is separate and distinct from the harms inflicted on their clients. Dkt. No. 95 at 2 (describing the harms Defendants' Policy has inflicted on the Organizational Plaintiffs). These harms include interference with Organizational Plaintiffs' ability to effectively represent detained immigrants, increased financial burden, and resource drains. *Id.*; *see also* Compl. ¶¶ 8, 24-26, 119, 121, 129-130, 132, 177-81, 182-84; Decls. of Organizational Plaintiffs, Dkt. No. 45, ¶¶ 5, 8-10, 15-16, 24-27, 29-33; Dkt. No. 46, ¶¶ 5, 7-10; Dkt. No. 47, ¶¶ 12-18, 20-22, 40; Dkt. No. 83, ¶¶ 3, 5, 9; Dkt. No. 84, ¶¶ 5-6; Dkt. No. 85, ¶¶ 3, 5-7, 11-12.

challenges to bond hearings. *See* Br. at 3-5.[2] The Supreme Court recognized the importance of the procedural posture of bond hearings in *Jennings*, finding that bond hearings are outside the reach of 1252(b)(9). *See Jennings*, 138 S. Ct. at 840 (holding that section 1252(b)(9) did not preclude review because question of right to a bond hearing did not "'aris[e] from' the actions taken to remove these aliens"). In its decision, this Court overlooked the distinction between bond hearings and removal proceedings, and therefore did not consider Plaintiffs' claims as they relate to bond hearings or appropriately apply relevant authority to the present case.

Defendants are mistaken that Plaintiffs did not identify key distinctions between bond and removal proceedings. Throughout these proceedings, Plaintiffs have challenged Defendants' Refusal to Produce Policy in all contexts—including at bond hearings—and repeatedly explained the distinction between bond and removal proceedings. *See, e.g.*, Compl. ¶ 27 n.5; Pls.' Ltr. Mot. Opp. Mot. Dismiss (Dkt. No. 95) at 1 n.1. In fact, Plaintiffs explained at oral argument that "bond and custody determinations are not part of the removal determination." May 29, 2019 Hr'g Tr. (Dkt. No. 97) 40:10-15. Plaintiffs further explained that "[t]he petition for review process does not provide . . . any way to review custody determinations." *Id.* at 9:3-7. In its Opinion, the Court overlooked and failed to consider these facts. The Opinion makes no reference to bond hearings and focuses only on the "process by which . . . removability will be determined," Dkt. No. 102 at 7, even though *Jennings* and the statutory scheme make clear that bond determinations are not part of the process of determining removability. *See Jennings*, 138 S. Ct. at 840.

[2] Moreover, that *Jennings* and other cases cited by Plaintiffs arise in a habeas context does not render them inapplicable here. None of the cases or statutory provisions cited by Defendants suggest that a habeas petition is the only way to avoid application of section 1252(b)(9). Indeed, *Jennings* specifically identifies a number of non-habeas claims that would not be barred by section 1252(b)(9). *See Jennings*, 138 S. Ct. at 840 (identifying, inter alia, potential tort claims). And other courts have recognized that detention-related claims can be made outside the habeas context. *See, e.g.*, *R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164, 185-86 (D.D.C. 2015) (Congress "has never manifested an intent to require those challenging an unlawful, nationwide detention policy to seek relief through habeas rather than the APA").

Defendants' argument that the distinctions between bond and removal proceedings are merely "procedural," and thus that bond determinations "arise from" removal proceedings, is not supported by relevant statutes, regulations, or case law. *Jennings* makes clear that individuals' claims relating to bond determinations do not "arise from" removal proceedings because such challenges do not relate to "any part of the process by which their removability will be determined." 138 S. Ct. at 840-41. The Supreme Court's determination in *Jennings* reflects the regulatory scheme, which provides that bond determinations "shall form no part of, any deportation or removal hearing." 8 C.F.R. § 1003.19(d). In an effort to ignore the lessons of *Jennings*, Defendants attempt to suggest the differences between bond and removal proceedings are purely "procedural" and relate only to how the records for "application[s] . . . regarding custody or bond" are kept. Opp. at 6. But Defendants' piecemeal recitation omits key language, which explains that "*[c]onsideration by the Immigration Judge* of an application . . . regarding custody or bond" is "separate and apart from" removal proceedings. 8 C.F.R. § 1003.19(d) (emphasis added). This requirement amounts to significantly more than a procedural distinction; it requires immigration judges to keep not merely records, but also the decisions based on those records, entirely separate in order to facilitate a separate and independent administrative appeal process for bond determinations. As *Jennings* recognized, "[c]ramming judicial review" of certain actions "into the review of final removal orders" would be "absurd." 138 S. Ct. at 840-41.[3]

Further, the "substance of the relief" test does not bar Plaintiffs' claims with respect to bond hearings. *Delgado*, a case relied upon by both the Court and Defendants, says only that

[3] Defendants' argument that this statement means that the *Jennings* Court "rejected the theory of plaintiffs' present motion that § 1252(b)(9) does not reach detention-related claims," Dkt. No. 111 at 7, is perplexing given that *Jennings* specifically held that the detention-related claims in that case were not barred by section 1252(b)(9).

section 1252(b)(9) precludes review of both direct and indirect challenges to orders of removal. 643 F.3d at 55. But as Plaintiffs explained in their Opening Brief, their claims with respect to bond hearings cannot be considered challenges to orders of removal. Br. at 3-4.[4]

Because Defendants cannot dispute the factual issues put forth in Plaintiffs' Opening Brief, they identify—for the first time—two new statutory provisions that they allege bar Plaintiffs' bond hearing claims: sections 1226(e) and 1252(a)(2)(B)(ii). The Court should not entertain these new and novel arguments at this stage.[5]

Even if the Court were to consider these arguments—and it should not—they are unavailing. Notably, Defendants' arguments with respect to these provisions are largely limited to a recitation of the statutory language. Their Opposition identifies *no* cases supporting their interpretation. This is unsurprising, given that Defendants' interpretation is incorrect.

Section 1226(e) states that courts may not "set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole." As section 1226(e) does not bar claims alleging that "*procedures* for [] bond hearing[s] were constitutionally and statutorily infirm," it does not apply to Plaintiffs' claims challenging Defendants' blanket use of VTC to conduct bond hearings. *See Torres v. Decker*, 18-CV-10026 (VEC), 2018 WL 6649609, at *1 (S.D.N.Y. Dec. 19, 2018) (emphasis added); *see also Bogle v. DuBois*, 236 F. Supp. 3d 820, 822 (S.D.N.Y. 2017) ("Claims of constitutional infirmity in the procedures followed at a bond hearing are not precluded by

[4] Defendants' argument that Plaintiffs did not ask for relief relative to bond hearings is also unavailing. Plaintiffs asked the Court to enjoin Defendants' Refusal to Produce Policy in its entirety, including with respect to bond hearings, and asserted that "any use of VTC" must comport with the "constitutional and statutory rights of the Plaintiffs." Compl. at 56.

[5] To the extent the Court intends to entertain Defendants' new arguments, Plaintiffs ask for the opportunity to more fully brief why these provisions have no application to Plaintiffs' bond-related claims.

§ 1226(e).").[6] Section 1252(a)(2)(B)(ii) similarly does not bar challenges to the process by which bond or parole decisions are made. *See, e.g.*, *Bermudez Paiz v. Decker*, 18-CV-4759 (GWH) (BCM), 2018 WL 6928794, at *5 (S.D.N.Y. Dec. 27, 2018) (holding that section 1252(a)(2)(B)(ii) did not bar claims because "federal courts retain jurisdiction to hear challenges to the process" relating to bond hearings); *Damus v. Nielsen*, 313 F. Supp. 3d 317, 327 (D.D.C. 2018) (same).

Because none of the jurisdiction-stripping provisions cited by Defendants or the Court bar claims relating to bond hearings, Plaintiffs' claims as they relate to bond hearings should be reinstated.

CONCLUSION

The Court should grant Plaintiffs' motion 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' prior briefing.

[6] In addition, Defendants' statement that "Immigration Judge[s] decide[] how each bond hearing is conducted," Opp. at 9, is at odds with every other representation they have made during this proceeding, and with the past and ongoing experiences of the Organizational Plaintiffs. *See, e.g.*, May 29, 2019 Hr'g Tr. (Dkt. No. 97) at 26:24-27:1 (Statement of Mr. Kochevar) ("Immigration judges do not have the express authority to order the production of an immigrant in immigration proceedings."). Just last week, DHS refused to produce a detained immigrant in person, even though an Immigration Judge had *ordered* in-person production. In a filing, DHS wrote that it was "well settled that the use of VTC technology in immigration court does not offend due process," and therefore, DHS would not be complying with the Immigration Judge's order. *See* U.S. Dep't of Homeland Security's Notice of Production of the Respondent Via Videoteleconferencing at 2-4 (attached hereto as Ex. 1).

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Respectfully submitted,

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