United States District Court
Western District of Texas
San Antonio Division

Susanna Dvortsin,
As next friend of; et al on behalf of
Hayam El Gamal,
Petitioner,

v.

Kristi Noem, Secretary of United States
Department of Homeland Security et. al.,
Respondents.

No. 5:25-cv-00664-OLG

Respondents' Advisory to the Court

Following transfer to this district, Petitioner, as next friend, filed a Motion to Extend the Temporary Restraining Order (TRO) that was then set to expire the following day. ECF No. 22. On June 18, the Court granted the TRO extension *ex parte* for an additional 14 days, noting that the Court would set a hearing via separate order. ECF No. 24. Subsequently, however, the Court issued an order calling into question the need for a hearing and further questioning whether a TRO was even necessary (or available) here. ECF No. 25. The Court identified three specific issues and ordered written advisories from the parties on each issue. *Id.* In response, Respondents provide the following:

I. Ms. El Gamal And Her Children Are in Removal Proceedings under 8 U.S.C. § 1229a; They Are Not Subject to Expedited Removal Proceedings under 8 U.S.C. § 1225(b).

Respondents refer this Court to their prior briefing and incorporate it here by reference. *See* ECF No. 15 (Response to Motion for TRO) at 2–6 (outlining the factual and procedural background of the pertinent issues in this case). Regardless of any confusion that may have existed at the outset of this litigation, there is no dispute currently that Ms. El Gamal and her children are in "full" removal proceedings in immigration court and are not subject to expedited removal proceedings under 8 U.S.C. § 1225(b). *See, e.g.,* ECF No. 13 at 11 n.4 ("DHS issued Notices to

Appear … pursuant to 8 U.S.C. § 1229a …. This would indicate that Respondents may not be subjecting Ms. El Gamal and her children to expedited removal."); No. 15 at 6 ("The Memorandum correctly acknowledges that Ms. El Gamal and her children have not been placed in expedited removal proceedings"); No. 26 at 5 ("Ms. El Gamal and her five children … are … not subject to expedited removal."); *see also Jennings v. Rodriguez*, 583 U.S. 281, 289, 306 (2018) (comparing detention under § 1226(a) with detention under § 1225(b)); 8 U.S.C. § 1225(b)(1)(A) (expedited removal proceedings are inapplicable to aliens who have been admitted to the United States).

Ms. El Gamal and her children, as visa overstays, were issued Notices to Appear (NTAs) in Immigration Court, where they have already appeared with counsel for their first removal hearing under 8 U.S.C. § 1229a. *See* ECF No. 15 at 3–4.[1] They are scheduled for a second (continued) removal hearing on July 11, 2025. *Id.* The NTAs, filed with the Executive Office for Immigration Review (EOIR) on or about June 4, 2025, contain the relevant factual allegations and the charge(s) of removal for each alien, confirming that they are in removal proceedings under § 1229a (*i.e.*, not "expedited" removal proceedings). *Id.*

II. The TRO Should Be Immediately Dissolved, Because ICE's Detention Authority During Removal Proceedings Is Well Settled under 8 U.S.C. § 1226(a).

The TRO is not necessary and should be immediately dissolved. As a threshold issue, Petitioner Susanna Dvortsin has not met her burden as "next friend." *See* ECF No. 15 at 16–20. Additionally, the legality of ICE's pre-removal-order detention authority under 8 U.S.C. § 1226(a) is a question of law that is firmly settled, and no argument to the contrary will prevail. *See Jennings*, 583 U.S. at 302–03; *Nielsen v. Preap*, 586 U.S. 392, 397–98 (2019); *see also* 8 U.S.C.

[1] *See* EOIR Automated Case Information, https://acis.eoir.justice.gov/en (last accessed June 24, 2024), using the relevant alien numbers to search for case status in the public database.

§ 1226(e) ("The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review."); *see also* ECF No. 15 at 21–26.

Under that statute, Ms. El Gamal and her children may file a motion for bond reconsideration at any time with the Immigration Court. *See* 8 U.S.C. § 1226(a). If the Immigration Judge finds there is no risk of flight or danger to the community, the Immigration Judge may set a bond, with or without conditions, to order their release from custody while they pursue relief from removal on the non-detained docket. *Johnson v. Guzman Chavez*, 594 U.S. 523, 527–28 (2021) (reviewing relevant regulations). Any adverse custody decision may be appealed administratively to the Board of Immigration Appeals (BIA). *Id.*

Ms. El Gamal and her children are being lawfully detained based on their own unlawful conduct, namely, unlawfully overstaying their visas in violation of 8 U.S.C. § 1227(a)(1)(B). And, contrary to Petitioner's claims, they will have the full opportunity to challenge their detention through the proper procedures before an Immigration Judge. *Id.* § 1226(a). But their attempt to bring a collateral challenge to raise those objections in this proceeding is barred multiple times over. *See* 8 U.S.C. §§ 1252(g), 1226(e), 1252(b)(9). The Court should therefore dissolve the TRO and dismiss this case in its entirety.

III. While the Court Has Jurisdiction to Issue a Show Cause Order, Such an Order is Unnecessary Where There is No Colorable Claim for Relief as a Matter of Law.

ICE's authority to detain aliens under § 1226(a) pending the decision on removal is discretionary and not subject to judicial review. 8 U.S.C. § 1226(e); *Nielsen*, 586 U.S. at 397–98 (citing 8 CFR §§ 236.1(c)(8) and (d)(1), 1003.19, 1236.1(d)(1) (2018)). These "regulations provide that aliens detained under § 1226(a) receive bond hearings at the outset of detention." *Jennings*, 583 U.S. at 306 (citing 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1)). No court, even in habeas review,

may set aside any decision regarding the detention or release of an alien or the grant, revocation, or denial of bond or parole. *Id.* § 1252(a)(5), (b)(9). While as-applied constitutional challenges may be brought under certain circumstances challenging prolonged detention, there is no colorable claim articulated in this habeas petition that § 1226(a), as applied to Ms. El Gamal and her children, is unconstitutional. *See, e.g., Jennings*, 583 U.S. at 312; *see also Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999). Ms. El Gamal and her children are being lawfully detained and charged with removability for remaining in the country without authorization. 8 U.S.C. § 1227(a)(1)(B).[2]

Petitioner's due process challenge is similarly without merit. While "the Fifth Amendment entitles aliens to due process of law in deportation proceedings, ... th[e Supreme] Court has recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process." *Demore v. Kim*, 538 U.S. 510, 523 (2003). Petitioner argues that the detention of Ms. El Gamal and her children violates due process on the ground that they are entitled to an individualized hearing. ECF No. 13 at 23-27. But § 1226(a) provides such review of their "detention by an officer at the Department of Homeland Security and then by an immigration judge (both exercising power delegated by the Secretary)." *Nielsen*, 586 U.S. at 397. Accordingly, any claim by Petitioner that Ms. El Gamal and her children lack an opportunity to contest their

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[2] Due to their pending removal proceedings, Ms. El Gamal and her children are no longer listed as derivative beneficiaries to a pending asylum application. *See* ECF No. 13 at 27; *see also* 8 C.F.R. 208.2(b) (the immigration court has exclusive jurisdiction to consider asylum for an alien served with a NTA that has been filed with the immigration court). To the extent that Ms. El Gamal claims lawful status under any other provision of the INA, she has not stated a plausible claim to such status, as her permission to remain in the United States as a visitor lapsed in 2023. *See* ECF No. 1 at ¶ 9. Moreover, any claims related to the filing of an employment-based petition are unsupported and would not cure a lapse in lawful immigration status in any event. *Id.*; *see also* https://www.uscis.gov/sites/default/files/document/forms/i-140instr.pdf (last accessed June 24, 2025) at 9 (noting that even if such a petition were approved, approval does not in itself grant permanent residence).

detention is contradicted by the statute and the regulations that provide them with such an opportunity, if they request it.

CONCLUSION

This TRO should be dissolved immediately, and the Court should dismiss the Petition.

Respectfully submitted,

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