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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

Eugene Division

M-S-L, an adult, Petitioner, v. DREW BOSTICK, et al., Respondents.	Case No. 6:25-cv-01204-AA PETITIONER'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS

I. Introduction

Petitioner M-S-L, through counsel, hereby submits the following response in opposition to Respondents' July 14, 2025, motion to dismiss. ECF 13.

In this Court, M-S-L challenges her unlawful detention, a challenge which "fall[s] within the core of the writ of habeas corpus and thus must be brought in habeas." *See Trump v. J. G. G.*, 145 S. Ct. 1003, 1005 (2025) (internal quotations omitted). Despite Respondent's claims otherwise, M-S-L does not challenge here the final order of removal. As described below, this Court has jurisdiction under 28 U.S.C. § 2241 and the Suspension Clause of the U.S. Constitution, art. 1, § 9, cl. 2, to review M-S-L's challenge to her unlawful detention.

II. Habeas jurisdiction and the Immigration & Nationality Act

Section 2241 of the U.S. Code provides the federal courts with habeas jurisdiction to determine whether a person is held in violation of the laws or Constitution of the United States. "At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *INS v. St. Cyr,* 533 U.S. 289, 301 (2001), *superseded on other grounds by statute as stated in Patel v. U.S. Att'y Gen.*, 971 F.3d 1258, 1270 (11th Cir. 2020). Federal courts have routinely exercised jurisdiction over claims regarding the unlawfulness of immigrant detention, including pre- and post-removal order detention and in the context of inadmissibility. *See Demore v. Kim*, 538 U.S. 510, 516-17 (2003) (federal courts have jurisdiction to hear challenges to mandatory detention under § 1226(c)); *Zadvydas v. Davis*, 533

U.S. 678, 687 (2001) (despite changes to immigration law, habeas remains "untouched as the basic method for obtaining review of continued *custody after* a deportation had become final") (emphasis in original); *Clark v. Martinez*, 543 U.S. 371 (2005) (taking jurisdiction over habeas petition of an immigrant held on inadmissibility grounds).

Furthermore, the Supreme Court recently clarified that when a petitioner's "claims for relief necessarily imply the invalidity of their confinement and removal ... their claims fall within the core of the writ of habeas corpus and thus *must* be brought in habeas." *J.G.G.*, 145 S. Ct. at 1005 (emphasis added) (internal quotations omitted).

Respondents' motion to dismiss misinterprets M-S-L's habeas petition, stating "[h]ere, Petitioner is inappropriately seeking review of the government's execution of a final order of removal." ECF 13 at 5. Petitioner is not asking this Court to review the order of removal, but instead, she asks this Court to review the means of her detention, which is the core of habeas and squarely within this Court's jurisdiction.

This Court already understands the distinction between what M-S-L requests in her habeas petition and what Respondents state in their motion to dismiss, writing:

> Although a United States District Court generally lacks subject matter jurisdiction to review orders of removal, see 8 U.S.C. § 1252(a)(1), (g), it does generally have jurisdiction over habeas petitions. *See* 28 U.S.C. § 2241(a); *see*

> *also Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004) (citing U.S. Const., Art I, § 9, cl. 2 and stating that "absent suspension, the writ of habeas corpus remains available to every individual detained by the United States.").

July 10, 2025, Order. ECF 6 at 3.

Habeas corpus means "that you have the body." Black's Law Dictionary (12th ed. 2024). The issue before the Court is precisely that: where will M-S-L *be* during her immigration matters? Either with her family (as Respondents previously released her to be) or locked up in custody, far from family, community, and legal counsel.

III. Petitioner clarifies her first claim for relief. At the time of detention, it was unknown what authority it was pursuant to.

Petitioner was detained while checking in with Respondents as they instructed. *See* Ex. A (Petitioner's ICE check-in sheet). Her phone was taken from her and she was removed from the building within an hour through a back exit, away from volunteer legal observers at the building. Ex. B at ¶14 (M-S-L's Declaration).

Because of this hurried rendition, Petitioner's counsel had limited information regarding her detention at the time the habeas petition was filed. Respondents' motion to dismiss clarified that she was detained under 8 USC § 1231(a)(5). ECF 13 at 6. Section 1231 also controls how a noncitizen detained under this provision can be released from detention.

Section 1231(a)(6) describes the individualized determination about how Petitioner had been previously released in March of 2024:

a. that she was not a risk to the community, and

b. she was likely to comply with the order of removal.

This was an individualized determination based on facts and it was not an arbitrary decision. Respondents released her.

M-S-L's subsequent detention on July 10, however, was not based on an individualized determination.

IV. M-S-L's July 10, 2025, detention was arbitrary and an abuse of discretion.

Under the Administrative Procedure Act ("APA"), a court shall "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. § 706(2)(A). An action is an abuse of discretion if the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

The facts strongly indicate that there was not an individualized determination about M-S-L's detention, or any determination at all *before* detaining her. It appears that any justification for the detention was made *post hoc* two days and four days after she was detained when the Notice of Revocation of Release was issued, and the supervising officer wrote his declaration. ECF 14-4; ECF 14. Additionally, the stated reasons in the Notice of Revocation of Release are different from the reasons in the officer's declaration.

Previously, M-S-L's March 2024 release required an individualized determination under 8 USC § 1231(a)(6), and Respondents did that.

The July 10, 2025, revocation of her release likewise required an individualized determination, but Respondents did not do that. An individual determination would have revealed that M-S-L's release continued to have merit:

- she continued to not have a criminal conviction and she was not dangerous to the community,
- she was in the act of complying with the order—she was attending her second check-in in two days, at Respondents' office, as instructed by officers, and
- her check-in form includes no missed check-in dates, she attended every check-in. Ex. A[1]; Ex. B at ¶ 12.

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[1] This exhibit is a copy of M-S-L's check-in sheet before she checked in with Respondents on July 9, 2025. The post-detention check-in sheet is not available to counsel yet, but it includes Respondents' July 9 signature and instructions to come back July 10. M-S-L's Decl. ¶ 12.

A. Respondents offer conflicting reasons for M-S-L's detention.

At the time of the July 10, 2025, detention, it appears Respondents themselves did not seem to know the reason why they detained M-S-L, as they did not draft the Notice of Revocation of Release until two days *after* they put her in custody. *See* ECF 14-4.

Furthermore, Respondents stated conflicting reasons for M-S-L's detention. The Notice of Revocation of Release stated it was because "there is a significant likelihood of your removal in the reasonably foreseeable future" (ECF 14-4) and the Supervisory Detention and Deportation Officer stated it was "due to several violations of the OSUP release agreement," including several missed check-ins. ECF. 14, Weiss Decl. ¶ 9.[2]

These are not nuanced ways to state the same reason for detention, they are completely opposite of each other. Foreseeable removal is an *event in the future*, and "several violations" of the OSUP are *events in the past*. These reasons are completely incompatible. It is unclear, and seemingly arbitrary, why M-S-L was detained.

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[2] "OSUP" is the Order of Supervision.

B. Supervisory Detention and Deportation Officer Jason Weiss's Declaration regarding "several violations of the OSUP release agreement" conflicts with the written record of M-S-L's check-ins.

Officer Weiss's statement about M-S-L having missed check-ins is impossible to reconcile with the check-in sheet, which has no blank lines, missing dates, or officers' notes. It shows M-S-L attended each check-in as instructed. *Compare* ECF 14, Weiss Decl. ¶ 9 *with* Ex. A (*see supra* footnote 1, regarding updated check-in sheet).

C. To comply with her Order of Supervision, M-S-L requested her attorney to coordinate her move to Oregon with ICE.

Officer Weiss also stated that M-S-L did not inform ICE about her move to Oregon, but in fact, she did everything within her control to update ICE. ECF 14, ¶ 9; and Ex. B at ¶¶ 8-9, 11-12.

To pursue her asylum claim in America, M-S-L hired a person that represented that she was an attorney, Teresa, in Salem, Oregon. Ex. B at ¶ 9. That person advised M-S-L that it would be easier to work on the case together if M-S-L was in Oregon. M-S-L knew that she must continue checking in with ICE, so she asked Teresa to arrange that. Teresa stated that she did so, even showing M-S-L what she represented as ICE's confirmation of the address change. *Id.*

Even if Teresa lied to M-S-L and did not actually arrange her move to Oregon with ICE, equitable principals still recognize that M-S-L herself did everything possible to comply with the OSUP: She hired her lawyer to update ICE. *See*

Withrow v. Williams, 507 U.S. 680, 699 (1993) ("The Court has long recognized that habeas corpus is governed by equitable principles….") (cleaned up) (O'Connor, J., concurring).

D. M-S-L's removal is not a foregone conclusion because ICE was repeatedly made aware of evidence of her membership in a protected particular social group.

M-S-L fled Mexico, in part, because she was persecuted for being a transgender woman. "Sexual orientation can be the basis for establishing a particular social group … for asylum purposes." *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1094 (9th Cir. 1999) (cleaned up). When M-S-L entered the United States, she had long hair and feminine clothing. Ex. B at ¶ 3. When immigration authorities at the border searched her body, they found that she was wearing a bra. Ex. B at ¶ 4. That officer made fun of her to the other officers, *i.e.*, several immigration officials knew she was transgender. *Id.* M-S-L's Order of Supervision includes a picture of her with long hair and feminine sculpted eyebrows. ECF 14-3.

Repeatedly observing her nonconforming gender identity, making determinations about which facilities to hold her (male or female) based on her perceived sexual orientation and nonconforming gender identity, knowing her fear of returning to Mexico, and scheduling a reasonable fear interview for her, Respondents overstated that there is a *significant* likelihood of removal in the reasonably foreseeable future when they issued the Notice of Revocation of Release. ECF 14-4. That assumption ignores the "rational connection between the facts found and the choice made." *Dep't of Com. v. New York*, 588 U.S. 752, 773 (2019) (citation omitted).

Respondents did not conduct an individualized determination of M-S-L's facts when they chose to detain her July 10, 2025.

V. There is a process to revoke release, but Respondents did not follow it

The process Respondents were to follow is provided by 8 CFR § 241.4(l):

> Upon revocation, the alien will be notified of the reasons for revocation of his or her release or parole. The alien will be afforded an initial informal interview promptly after his or her return to Service custody to afford the alien an opportunity to respond to the reasons for revocation stated in the notification.

Here, M-S-L was taken into custody with no notification of the reasons, and she was hurried out the back of the ICE office. Ex. B at ¶¶ 13-14. Respondents didn't give her a notice until two days after she was detained and after she had filed her habeas petition. ECF 14-4. The notice she received is in English only and contains no indication it was read to her in Spanish. *See* ECF 14-4; *see also* Ex. B at ¶ 17.

M-S-L must be afforded an initial informal interview promptly after her return to custody. 8 CFR § 241.4(l)(1). Twice, on July 9 and again July 10, M-S-L presented herself to ICE at the Eugene office. It would have been simple to ask her about any perceived reasons for revoking release. *See* Ex. B at ¶¶ 13-14. She would have pointed to her complete check-in sheet with no missed dates. But Respondents chose instead to detain her, rush her out of the state, and, on information and belief, as of the time of this filing, have not interviewed her regarding the reasons for revocation stated in the notification, as required by 8 CFR § 241.4(l)(1).

Furthermore, it is unclear whether the correct official made the decision to revoke release and signed the Notice of Revocation. Only the Executive Associate Commissioner or the District Director may revoke release. 8 CFR § 241.4(l)(2). Officer Weiss took M-S-L into custody, effectively making the decision to revoke release. Even if the District Director made the choice, the revocation must have been after an opinion is rendered that M-S-L's revocation is in the public interest and circumstances do not reasonably permit referral of the case to the Executive Associate Commissioner. *Id.* There is no evidence that anyone tried to refer the case to the Executive Associate Commissioner. Regardless, here it wasn't even the director, it was a *deputy* field office director who signed the notice to revoke and purportedly made the choice. ECF 14-4.

Assuming *arguendo* that the correct official revoked release, the regulations lay out individualized criteria for revocation of release. *See* 8 CFR § 241.4(l)(2)(i)-(iv). There is no evidence that *any* individualized determination was made.

The process is clearly laid out in the CFR, and Respondents did none of it.

VI. M-S-L has due process rights under the United States Constitution

The Due Process Clause of the Fifth Amendment to the U.S. Constitution prohibits the federal government from depriving any person of "life, liberty, or property, without due process of law." U.S. Const. amend. V. Due process protects "all 'persons' within the United States, including [non-citizens], whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

A. MSL expressed her fear of persecution in Mexico, and Respondents ignored her.

The INA requires that if a noncitizen at the border "indicates either an intention to apply for asylum ... [or expresses] a fear of persecution, the officer *shall* refer the alien for an interview by an asylum officer[.]" 8 USC § 1225(b)(1)(A)(ii) (emphasis added). On each of her entries to the United States, MSL told immigration officials that she feared returning to Mexico and desired to apply for asylum. Ex. B at ¶¶ 4-7. After her first entry, officers claimed to be too busy to allow her an interview. *Id.* After her second entry, she thought officers were helping her apply for asylum, only to be put on a bus to Mexico. *Id.*

B. Respondents' decision to re-detain M-S-L was arbitrary.

Due process requires that government action be rational and non-arbitrary. *See U.S. v. Trimble*, 487 F.3d 752, 757 (9th Cir. 2007). For the same reasons explained in section IV, above, Respondents' actions and justifications for detaining

M-S-L were irrational and arbitrary. The due process clause prohibits precisely that.

Section V above also discusses the process Respondents were to follow to revoke MSL's release, and they did not follow it.

VII. Conclusion

For the stated reasons above and in the First Amended Petition for Writ of Habeas Corpus, M-S-L respectfully submits that this Court has jurisdiction over all the claims she asserts in her habeas petition.

Dated: July 25, 2025

s/Robert Easton
Robert Easton

s/ Kara Anne Sagi
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s/ Kurt David Hermansen
Kurt David Hermansen
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