UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Martin Berchie,

Petitioner

v.

Pamela Bondi, Attorney General; Kristi Noem, Secretary of Homeland Security; Todd M. Lyons, Acting Director of U.S. Immigration & Customs Enforcement; Marcos Charles, Acting Executive Associate Director for Enforcement and Removal Operations; Peter Berg, Field Office Director for Enforcement and Removal Operations; U.S. Immigration & Customs Enforcement; U.S. Department of Homeland Security; Joel Brott, Sherburne County Sheriff.

Respondents.

Case No.: 25-CV-03197-KMM-SGE

REPLY TO RESPONSE OPPOSING MOTION FOR EVIDENTIARY HEARING

INTRODUCTION

Petitioner previously alleged fraud and bad faith by Respondents and their agents. In light of the robust affidavits of Deportation Officers Lee and Rodkewich, Petitioner withdraws any allegations of knowingly participating in fraud or bad faith on the part of the Deportation Officers or any other rank-and-file employees or agents of the United States government. *See* ECF Nos. 36-37.

Petitioner continues to assert that the travel document used for his deportation was not authentic because it was not issued by Ghana. Petitioner believes that the document

was created by someone in ERO HQ and was then passed off as an authentic travel document to rank-and-file employees.

ARGUMENT

Petitioner concedes that a travel document with a typographic error in the travel document number remains a valid travel document, at least for purposes of the present proceeding, so long as it sourced from the foreign sovereign. Petitioner cannot subpoena a foreign sovereign to compel testimony or document production relating to this issue. If Petitioner were to file a FOIA request, as Respondents suggest should have occurred, the relevant documents would likely be withheld pursuant to 5 U.S.C. § 552(b)(1), (3), (5), and/or (7), assuming they exist at all.

Due to informational asymmetries, it is impossible for Petitioner to prove his allegation with positive direct evidence at the present stage of proceedings. However, Respondents must be able to prove with positive direct evidence that Petitioner's allegations are false. In order for ERO HQ to have obtained a travel document from Ghana for Petitioner, someone in ERO HQ must have received that document from the Ghanian embassy. The individual that received the travel document must be known to Respondents, and must be capable of being identified and submitting a declaration that states they received Petitioner's travel document from Ghana on September 4, 2025 at some point in time subsequent to when ERO HQ emailed the Ghanian embassy that same day.

Respondents have provided four affidavits from deportation officers, none of whom have personal knowledge of where the travel document originated. These deportation officers are not competent to testify to the authenticity of the travel document.

Their statements regarding the travel document's authenticity are hearsay and otherwise lack probity regarding authenticity. Conversely, Petitioner has provided an affidavit stating that Ghanian officials told him "the numbers on my travel document were actually the numbers used for someone else and… indicated the document had already been used to enter Ghana previously." ECF No. 31 ¶ 3.i. Petitioner's statements are not hearsay. *See* Fed. R. Evid. 803(1)-(3).

The declarations submitted by Respondents do not meaningfully address the authenticity or source of the travel document. Respondents are solely responsible for maintaining evidence relating to the obtention and authenticity of travel documents used to deport noncitizens. Respondents' failure to identify who received the travel document from Ghana permits the Court to make an adverse inference, holding that if Respondents could identify where the travel document originated and came to be possessed by ERO HQ, it would have done so. 28 U.S.C. § 2254(f) (requiring the State, in certain sufficiency of the evidence challenges, to provide pertinent parts of the record and stating, "[i]f the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination"); *Breighner v. Chesney*, 301 F. Supp. 2d 354 (M.D. Pa. 2004) (interpreting 28 U.S.C. § 2254(f) to mean "if the state fails to meet this burden, subsection (f) permits the court to accord no weight to the state court's factual finding even though the petitioner has not produced any evidence in opposition to it"). That adverse inference in combination with Petitioner's declaration justifies granting an evidentiary hearing. At minimum, it supports ordering Respondents to provide a declaration from the governmental official

who received the travel document directly from Ghana to determine whether an evidentiary hearing is warranted, assuming *arguendo* the Court retains jurisdiction despite the allegedly unlawful deportation.

Petitioner's case is not moot. Mootness is divided into at least two categories: (1) constitutional mootness; and (2) equitable mootness. Constitutional mootness is a jurisdictional concern. *E.g.*, *Powell v. McCormack*, 395 U.S. 486, 496 (1969); *Liner v. Jafco, Inc.*, 375 U.S. 301 (1964). Constitutional mootness arises when an intervening circumstance has deprived the plaintiff of a personal stake in the outcome of the lawsuit under Article III's case-or-controversy requirement. *Moore v. Harper*, 600 U.S. 1 (2023); *In re Williams*, 256 B.R. 885, 895 (B.A.P. 8th Cir. 2001). Equitable mootness is a prudential doctrine that operates only after constitutional jurisdiction is established. *See In re Williams*, 256 B.R. at 896. Equitable mootness concerns whether changes to the status quo make it impractical or inequitable to "unscramble the eggs." *In re Financial Oversight & Mgmt. Bd. for Puerto Rico*, 987 F.3d 173, 186 (1st Cir. 2021). This distinction is critical because equitable mootness represents a discretionary choice to retain jurisdiction while declining to exercise it for equitable reasons. Equitable mootness is subject to the doctrine of unclean hands. *In re Williams*, 256 B.R. at 896 (holding that the appellee was disentitled to equitable mootness because they "ha[d] unclean hands").

Petitioner's case is not constitutionally moot. Petitioner maintains a personal stake in the outcome, a controversy is present, and the Court has the power to order Respondents to return Petitioner to the United States until a valid travel document is obtained assuming *arguendo* Petitioner demonstrates after an evidentiary hearing by a preponderance of the

evidence that the travel document lacked authenticity. *See Arostegui-Maldonado v. Baltazar*, --- F. Supp. 3d ---, 2025 WL 2280357, at *12 (D. Colo. Aug. 8, 2025) (using the All Writs Act, 28 U.S.C. § 1651, to prevent an immigration detainee's transfer outside the jurisdiction to prevent the petitioner's "unlawful removal from the United States… during the pendency of these habeas proceedings" and collecting sources). Petitioner continues to satisfy the in-custody requirement for habeas jurisdiction if his deportation occurred unlawfully. *See Jones v. Cunningham*, 371 U.S. 236 (1963) (physical detention is not required to meet jurisdictional custody requirement, but there must be some restraint on liberty); *Zolicoffer v. U.S. Dep't of Justice*, 315 F.3d 538, 540 (5th Cir. 2003) (In the immigration context, an alien subject to a final deportation order is "in custody" for purposes of § 2241).

Petitioner's case is not equitably moot because, if Petitioner proves his allegations, he necessarily demonstrates that Respondents have unclean hands.

8 U.S.C. § 1252(g)'s jurisdiction-stripping provision does not deprive the Court of subject-matter jurisdiction.

> Following *AADC*, the First Circuit has held that section 1252(g) does not bar review of the "lawfulness" of a removal-related action because such claims are "collateral" to the discretionary decisions immunized by section 1252(g). *Kong v. United States*, 62 F.4th 608, 617 (1st Cir. 2023); *accord United States v. Hovsepian*, 359 F.3d 1144, 1155 (9th Cir. 2004) (*en banc*) ("The district court may consider a purely legal question that does not challenge the Attorney General's discretionary authority, even if the answer to that legal question—a description of the relevant law—forms the backdrop against which the Attorney General later will exercise discretionary authority."); *Madu v. U.S. Att'y Gen.*, 470 F.3d 1362, 1368 (11th Cir. 2006) ("While this provision bars courts from reviewing certain exercises of discretion by the attorney general, it does not proscribe substantive review of the underlying legal bases for those discretionary

> decisions and actions."); *Bowrin v. U.S. INS*, 194 F.3d 483, 488 (4th Cir. 1999) (holding that section 1252 "does not apply" to Government's interpretations of law); *see also Texas v. United States*, 809 F.3d 134, 164 (5th Cir. 2015), *as revised* (Nov. 25, 2015) ("The [Supreme] Court [in *AADC*] emphasized that § 1252(g) is not 'a general jurisdictional limitation,' but rather 'applies only to three discrete actions.' " (quoting *AADC*, 525 U.S. at 482, 119 S.Ct. 936)), *affirmed by an equally divided court sub nom. United States v. Texas*, 579 U.S. 547, 136 S.Ct. 2271, 195 L.Ed.2d 638 (2016); *cf. Camarena v. Dir., Immigr. & Customs Enf't*, 988 F.3d 1268, 1271, 1272–73 & n.2 (11th Cir. 2021) (confirming its narrow reading of section 1252(g) in *Madu*, based on *AADC*, but finding that section 1252(g) barred review of decision to remove pending *discretionary* waiver process).
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> Hewing close to the Supreme Court's guidance in *AADC* and the First Circuit's holding in *Kong*, this Court will not construe section 1252(g) to immunize an unlawful practice from judicial review. *See also Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 671–72, 106 S.Ct. 2133, 90 L.Ed.2d 623 (1986) ("[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review.").

D.V.D. v. U.S. Dept. of Homeland Security, 778 F. Supp. 3d 355, 376-77 (D. Mass. 2025).

CONCLUSION

On the record before the Court, an evidentiary hearing is warranted.

DATED: October 17, 2025

Respectfully submitted,

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