UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
(Houston Division)

Roshan Akbar MOMIN,

Petitioner,

v.

CIVIL ACTION NO. 17 CV 568

ROBERT LACY, Jr., as Warden
for the Houston Processing Center, CCA, Inc.,

PATRICK CONTRERAS, as Field Office Director
for Detention and Removal for
Immigration and Customs Enforcement,

IMMIGRATION AND CUSTOMS ENFORCEMENT,
as an agency of the Government of the United States of America,

and

DEPARTMENT OF HOMELAND SECURITY,
as an agency of the Government of the United States of America,

Respondents.

PETITION FOR A WRIT OF HABEAS CORPUS
PURSUANT TO 28 U.S.C. § 2241

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
(Houston Division)

Roshan Akbar MOMIN,

Petitioner,

v.

CIVIL ACTION NO. 17 CV 568

ROBERT LACY, Jr., as Warden
for the Houston Processing Center, CCA, Inc.,

PATRICK CONTRERAS, as Field Office Director
for Detention and Removal for
Immigration and Customs Enforcement,

IMMIGRATION AND CUSTOMS ENFORCEMENT,
as an agency of the Government of the United States of America,

and

DEPARTMENT OF HOMELAND SECURITY,
as an agency of the Government of the United States of America,

Respondents.

PETITION FOR A WRIT OF HABEAS CORPUS
PURSUANT TO 28 U.S.C. § 2241

I. INTRODUCTION

Mrs. Roshan Akbar Momin is a 48-year-old housewife from Pakistan, living in Friendswood, Texas. Last September, she discovered a lump in her breast and, concerned it was breast cancer, saw her family doctor. She was referred to a specialist clinic, where she received an ultrasound and a needle biopsy. The results were "highly suggestive of malignancy," and her doctors all recommended that the mass be surgically removed.

Before she could schedule surgery, she was arrested and taken into custody by Immigration and Customs Enforcement (ICE), due to the existence of an outstanding order of exclusion issued in 1994. Mrs. Momin's attorney had received notice of the order's existence only days before her arrest. The Immigration Court's notices to her in 1994 had been misaddressed by the clerk, and returned to the court as undeliverable. An emergency motion to reopen the exclusion proceeding and to rescind the *in absentia* order of exclusion was granted by the Immigration Judge in December 2016, and the order of exclusion was vacated.

With the basis for her detention thus removed, Mrs. Momin's lawyers sought her release. So far, ICE has refused, in direct contravention of the governing regulations and the published policies on the enforcement and detention policies for the Department of Homeland Security. It has also refused her medical care. There is no indication how many weeks, months, or years her detention will continue.

The sole avenue for review of Mrs. Momin's detention is a petition for a writ of habeas corpus filed with this Court.

II. PRAYER FOR RELIEF

Mrs. Momin respectfully asks this Court to conduct an individualized bond hearing to determine whether she is a flight risk or a danger to the community. If the Government fails its burden of showing either factor, Mrs. Momin requests that she be ordered released, either on bond or on her own recognizance.

III. PRELIMINARY STATEMENTS

A. Parties

This is a civil action in which Respondents are officers or employees of the United States or an agency thereof, acting in their official capacity.

Applicant Mrs. Roshan Akbar Momin is a resident of Friendswood, Texas. She is a native and citizen of Pakistan. She has lived continuously in Texas since 1993. She is the mother of two sons, both U.S. citizens by virtue of their birth, and she works as a cashier at a convenience store. She is the beneficiary of an approved I-130 immediate relative immigrant visa petition filed by her U.S. citizen son, and she has no criminal record.

Respondent Robert Lacy, Jr., is the Warden for the Houston Processing Center, a private facility owned and operated by CCA, Inc., located in Houston, Texas, and contracted by the Department of Homeland Security to detain aliens pending removal. Mr. Lacy has physical custody of Mrs. Momin. Mr. Lacy is sued in his official capacity.

Respondent Patrick Contreras is the Field Office Director for Detention and Removal for Immigration and Customs Enforcement (ICE) and is responsible for the supervision and administration of the immigration and nationality laws in the Houston Field Office for ICE. Mr. Contreras has legal custody of Mrs. Momin. Mr. Contreras is sued in his official capacity.

Respondent Immigration and Customs Enforcement (ICE) is an agency within the Department of Homeland Security. It is responsible, in part, for the administration and enforcement of the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1101 *et seq.*

Respondent Department of Homeland Security (DHS) is a cabinet department of the federal government, responsible for the administration and enforcement of the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1101 *et seq.*

B. Jurisdiction

The jurisdiction of this Court is invoked pursuant to Article I, Section 9, Clause 2, of the United States Constitution (the Great Writ), Title 28 U.S.C. § 2241, *et seq*. (the statutory codification of the Constitution's Great Writ), and Title 28 U.S.C. § 1651 (the All Writs Act encompassing within its purview the Great Writ).

Fundamental changes in immigration law and procedure, including habeas claims, were effected by a series of legislative acts passed in the mid-1990s: the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C

of Pub. L. 104–208, 110 Stat. 3009-546 (enacted September 30, 1996) (hereinafter IIRIRA); the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (enacted April 24, 1996); and the REAL ID Act, Pub. L. No. 109-13, 119 Stat. 231, 302 (enacted May 11, 2005). Despite these changes, the Supreme Court has made clear that federal district courts retain "habeas jurisdiction under § 2241" to evaluate aliens' claims of constitutional deprivation. *INS v. St. Cyr*, 533 U.S. 289, 293, 313-14 (2001); *see also* H.R. Rep. No. 109-72, at 300 (2005) (making clear that the REAL ID Act's divestment of habeas jurisdiction over removal orders did not extend to challenges to matters other than removal orders). Furthermore, the Supreme Court "has suggested…that the Constitution may well preclude granting 'an administrative body the unreviewable authority to make determinations implicating fundamental rights.'" *Zadvydas v. Davis*, 533 U.S. 678, 692 (2001) (quoting *Superintendent, Mass. Correctional Institution at Walpole v. Hill*, 472 U.S. 445, 450 (1985)). As the Supreme Court has held, "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." *St. Cyr*, 533 U.S. at 301.

Accordingly, under § 2241, district courts "retain habeas jurisdiction to review statutory and constitutional claims." *Bravo v. Ashcroft*, 341 F.3d 590, 592 (5th Cir. 2003). Such "distinction comports with the historical understanding of the writ of habeas corpus as a mechanism for remedying for an official's refusal to

exercise discretion, but not a 'substantively unwise exercise of discretion.'" *Id.* at 592-93 (quoting *St. Cyr*, 533 U.S. at 307).

A federal district court has broad discretion in conditioning a judgment granting habeas relief. Federal courts are authorized, under 28 U.S.C. § 2243, to dispose of habeas corpus matters "as law and justice require." *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987)).

C. Venue

Venue in this Court is proper in this District pursuant to Title 28 U.S.C. §§ 1391(b) and (e). Mrs. Momin is being detained physically at the Houston Processing Center, owned and operated by CCA, Inc., in Houston, Texas. The Respondents Patrick Contreras and Robert Lacy are physically located within the jurisdiction of this Court and are the legal and physical custodians, respectively, of Mrs. Roshan Akbar Momin.

D. Exhaustion of administrative remedies

Petitioner Mrs. Momin has exhausted her administrative remedies to the extent required by law. Mrs. Momin's multiple requests for release were denied or ignored by the Field Office Director of ICE, and there is no other avenue for her to obtain relief. Under the controlling regulation at 8 C.F.R. § 1003.19(h)(2)(i)(A), the immigration judge presiding over her exclusion hearing does not have jurisdiction to hold a bond hearing. Thus, apart from requests to ICE officials, there is no possibility of exhausting claims before the agency. *Garza-Garcia v. Moore*, 539 F. Supp. 2d 899 (S.D. Tex. 2007) ("The BIA lacks the authority to

rule on the issue Garza complains of, and therefore the exhaustion of administrative remedies in this case will not speak to or resolve the issues involved in this case.").

E. Prior judicial review

Mrs. Momin has not filed any other petition for judicial review with this or any other court.

IV. NOTE ON APPLICABLE LAW

As this case concerns an order of exclusion entered in 1993, before major statutory changes altered the immigration scheme, a brief survey of the legal landscape may be beneficial to this Court.[1]

IIRIRA significantly changed the immigration laws of the United States. Among other things, it unified the proceedings for what were previously two different paths to expulsion from this country: exclusion and deportation. Pre-IIRIRA, exclusion hearings applied to arriving aliens (aliens who had not yet "entered" the United States), and deportation hearings applied to aliens who had entered the country, with or without inspection. Exclusion hearings entailed entirely separate procedures from deportation hearings. *Landon v. Plasencia*, 459 U.S. 21, 27 (1982).

Pending exclusion proceedings, immigration officers could "parole," or allow, arriving aliens into the country, but this did not alter the aliens' status as

[1] The Appendix provides the 1993 versions of the most relevant statutes and regulations for the convenience of the Court. App. at 2-11.

excludable. This is known as the "entry fiction," for it regards such parolees as if they still stood at the border, rather than having made an entry into the United States.

IIRIRA combined both types of proceedings into *removal hearings*, which apply to all aliens. Immigration officers are still authorized to parole aliens out of detention during certain stages of these proceedings, but the statutory and regulatory directives for such parole have changed. *See infra.*

V. FACTS AND PROCEDURAL HISTORY

Mrs. Roshan Akbar Momin is a native and citizen of Pakistan. App. at 13. She married Mr. Akbar Momin in February 1989, in Karachi, Pakistan. App. at 14.

On or about December 23, 1993, Mrs. Momin flew to the United States, arriving at Chicago's O'Hare airport. She presented to the immigration inspector a passport containing a U.S. visitor's visa. The immigration inspector apparently determined that the visa was counterfeit.

The immigration inspector issued a form I-546 Order to Appear – Deferred Inspection to Mrs. Momin, under her maiden name of "Roshan Akbar." The Order to Appear listed Mrs. Momin's address as *11303 Wheelcrees* Drive in Houston. This form indicated that she should appear at the office of the Immigration and Naturalization Service (INS) in Chicago "on the date and time cited," which was filled in as "To Be Determined." App. at 18. It further indicated that the applicant "spoke Guerata [sic]" and that "No statement was taken due to the unavailability

of a Juerata [sic] interpreter." *Id.* The language Mrs. Momin speaks is Gujarati. *See also* app. at 19-20. Mrs. Momin was released to continue her journey to Houston, Texas.

On February 17, 1994, the Immigration Court in Houston issued a Notice of Hearing in Immigration Proceeding to determine if Mrs. Momin was excludable from the United States. App. at 22. The Notice of Hearing was incorrectly mailed to *10300 Wilcrest* Drive in Houston, an address which differed significantly from the address typed on the Order to Appear. The Notice was returned to the Immigration Court by the U.S. Postal Service as undeliverable due to having an "insufficient address." App. at 23. Mrs. Momin therefore had no notice that exclusion proceedings were taking place, much less at which city and at what date and time. Despite this fact, the Immigration Judge (IJ) conducted an exclusion hearing *in absentia*, and on March 31, 1994, issued an order of exclusion and deportation. This Order was mailed to the same address as the Notice and it was also returned as undeliverable. App. at 24-26.

After her arrival in Houston in December 1993, Mrs. Momin and her husband lived in Houston, where Mr. Momin worked. Eventually they had two children, both U.S. citizens. App. at 15-16.

In 2004, Mrs. Momin applied for lawful permanent resident status with DHS as a derivative of her husband's application, which was based on an employer's petition. DHS held both applications for seven years, finally denying them in 2011 because the employer who had petitioned for her husband had gone

out of business. App. at 28-29. During those seven years, DHS did not inform Mrs. Momin of the outstanding order of exclusion, and it did not deny her application based on this; the denial was based solely on the grounds that her husband's application had been denied. Since she was a derivative of her husband's application, hers was denied as well. *Id.*

In 2016, Mrs. Momin's eldest son Asim Momin, who had turned twenty-one years old, filed with the Citizenship and Immigration Services (CIS) a Petition for an Alien Relative (Form I-130) in behalf of his mother. Mrs. Momin, as is the practice, concurrently filed an application for legal permanent residence (I-485). On August 18, 2016, Mr. Asim Momin's I-130 Petition was approved. App. at 31.

On September 16, 2016, Mrs. Momin consulted with a physician about a mass in her left breast and associated pain. On September 29, 2016, an ultrasound indicated that the mass in Mrs. Momin's left breast was a "3 cm irregular mass … highly suggestive of malignancy." Mrs. Momin was advised to obtain a needle biopsy. App. at 86.

On September 29, 2016, Mrs. Momin's I-485 Application was mistakenly administratively closed by CIS, on a finding that CIS lacked jurisdiction to evaluate an application of an alien in "removal proceedings." App. at 32-33. The notice stated, "on April 7, 1994, an Immigration Judge ordered you excluded and deported from the United States under the Alien file number A073015578, under the name Ruhsn [sic] AKBAR." This was the first time Mrs. Momin could have

been aware that exclusion proceedings had been held, and that an order of exclusion had been issued.

On October 13, 2016, a needle biopsy was performed to determine if the mass in Mrs. Momin's breast was malignant. Her physician's conclusion was that the "[p]athology results are discordant with imaging findings. A surgical excision is recommended." She was informed of this conclusion orally while at the clinic on October 13. App. at 88-89.

On or about October 24, 2016, Mrs. Momin was taken into custody by ICE, app. at 37, and placed in detention, on the authority of a statute mandating detention for those with an outstanding removal order. On October 28, 2016, Mrs. Momin's attorney filed an Emergency Motion to Reopen and Stay Removal with the IJ, arguing that Mrs. Momin's right to due process was denied when an IJ ordered her excluded and deported *in absentia* because she never had received notice of any hearing. App. at 44-55.

On November 8, 2016, Mrs. Momin's first attorney (Mr. James Parker) contacted Respondent Patrick Contreras, Field Office Director of ICE for Houston, seeking Mrs. Momin's release. App. at 38-40. In his request, her attorney explained that Mrs. Momin "was completely unaware of the removal order from 1994 which she has never seen." App. at 38. He also advised ICE that "Mrs. Momin also has a lump in her left breast which is requiring further treatment." *Id.* He explained that she had lived in Texas for over twenty years, had close family there, and good prospects for adjustment of status, making her unlikely to flee; and

that she had no criminal history and posed no threat to national security or public safety. *Id.*

On December 7, 2016, realizing its error, the CIS reopened its September 29 decision to administratively close Mrs. Momin's application for adjustment of status to lawful permanent resident, and then it promptly denied it. App. at 34-35. The CIS's denial relied, in part, on its belief that Mrs. Momin had known of the order of exclusion issued in 1994.

On December 12, 2016, the IJ ordered that Mrs. Momin's exclusion proceedings be reopened "to rescind the order of exclusion and deportation," as her due process rights had been violated when the hearing was held without adequate notice to her. App. at 56-59. The final exclusion order is therefore no longer operative, and Mrs. Momin's exclusion proceedings are currently pending. This decision changed the legal basis for Mrs. Momin's detention, as explained more fully below.

On December 23, 2016, Mrs. Momin's attorney mailed another request to Respondent Patrick Contreras, again seeking Mrs. Momin's release. App. at 61-63. He informed Mr. Contreras that there was no longer an exclusion order on which to base Mrs. Momin's detention. In addition, her attorney re-stated that Mrs. Momin's health condition requires surgery "as soon as possible."

On January 12, 2017, the undersigned, Mrs. Momin's newly retained lawyer, supplemented the release request to Respondent Patrick Contreras. This request provided important additional facts and details, including the urgency of

the situation with her tumor, the circumstances of her 1993 entry, the likelihood that she will receive immigration relief, and her ignorance of the exclusion order until late in 2016. App. at 64-71.

On January 19, 2017, without referencing the January 12 submission, which he apparently declined to consider, Mr. Contreras issued a decision to Mrs. Momin's first attorney denying his request for her release. App. at 72. Mr. Contreras's decision did not identify any source of authority for his detention of Mrs. Momin, and dismissed her medical condition as "treatable by DHS medical staff," without naming it or indicating what treatment was appropriate or available. Mr. Contreras wrote, *inter alia*, "Mrs. Momin also poses a flight risk as she has absconded from her exclusion order for more than 20 years," failing to acknowledge the IJ's binding conclusion that Mrs. Momin had not been informed that an order of exclusion had been entered against her until late 2016, either shortly before or shortly after she was taken into custody. Mr. Contreras's denial did not address the question of which body of law applied to her detention, and it neither noted nor addressed several of the factors identified as relevant in the regulations which govern parole decisions.

On February 2, 2017, the undersigned submitted another request for Mrs. Momin's release to Mr. Contreras. App. at 74. This was denied without review on the ground that ICE had previously denied the prior counsel's request for release. The denial did not address any of the additional facts and details that the undersigned's submissions had provided.

On February 3, 2017, the undersigned attorney submitted an I-485 Application for Adjustment of Status for Mrs. Momin, based on her approved I-130 Petition for an Alien Relative, along with an application for a waiver of inadmissibility, seeking a waiver for Mrs. Momin's use of a counterfeit visitor's visa in 1993. These waivers are routinely granted in cases with such overwhelming equities as Mrs. Momin's, and she is in all other ways fully qualified for adjustment of status. This application for adjustment of status and the currently filed waiver request are pending.

Mrs. Momin remains in ICE custody at the CCA Houston Processing Center, in Houston, Texas. According to reports she has made to her family, the mass in her breast has continued to grow and is increasingly painful. Mrs. Momin has reported to her family that she has reported these developments to the prison staff, and the sole treatment they have offered is Tylenol.

Two of her physicians have scheduled appointments for Mrs. Momin: her oncologist, on February 16, and her surgeon, on February 23. App. at 91-92. The undersigned submitted a request to ICE to arrange for her transportation to these appointments, with a female agent to accompany her. App. at 83. ICE has not even bothered to respond to the request to attend these appointments, and did not transport her to the February 16 appointment.

VI. ARGUMENT

A. This Court has the authority to release an alien being detained in contravention of due process

1. The writ is available to remedy constraints on the liberty of aliens detained in violation of due process

"Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690. Thus, "government detention violates that Clause unless the detention is ordered in a criminal proceeding with adequate procedural protections, or, in certain special and 'narrow' non-punitive 'circumstances,' where a special justification, such as harm-threatening mental illness, outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" *Id.* (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) and *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)) (internal citations omitted).

The Supreme Court has found that detention prior to a removal order is justifiable for certain classes of aliens (mostly aliens with criminal convictions), but it based its decision in part on the understanding that the "detention at stake…lasts roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal." *Demore v. Kim*, 538 U.S. 510, 530 (2003). Courts have therefore found that prolonged or otherwise unreasonable detention prior to removal orders can violate due process. *Rodriguez v. Robbins*, 804 F.3d 1060, 1082 (9th Cir. 2015)

(discussing precedent holding "that to avoid serious constitutional concerns, mandatory detention … must be construed as implicitly time-limited," and requiring individualized bond hearings); *Ramirez v. Watkins*, No. CIV.A. B:10-126, 2010 U.S. Dist. LEXIS 142508, at *1 (S.D. Tex. Nov. 3, 2010) ("When the facts of a case are not directly controlled by *Demore* it stands to reason that traditional Fifth Amendment analysis would trigger a right to a meaningful, individualized hearing to justify continued detention."); *Garza-Garcia*, 539 F. Supp. 2d at 907 ("It is clear from *Kim* [i.e., *Demore*] that Congress may constitutionally provide for mandatory detention without bond for certain classes of criminal aliens it has determined are inherently dangerous and at risk of flight. However, as the Court in *Kim* seems to assume, Congress' authority to do so depends on observance of basic due process rights, such an accused's right to contest whether he is in fact part of the group covered by the statute. This idea is as basic as an identity hearing, or a probable cause examination in our system of jurisprudence."); *see also Demore*, 538 U.S. at 532 (Kennedy, J., concurring) (warning in the concurrence that formed the majority opinion that a detainee "could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified.").

Likewise, after a removal order is issued, "prolonged detention without adequate procedural protections would raise serious constitutional concerns." *Rodriguez*, 804 F.3d at 1065-66; *Zadvydas*, 533 U.S. at 690.

While excludable aliens do not have the same breadth of constitutional rights that citizens and even deportable aliens do, they still have a right to the most basic tenets of due process. *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that foreign nationals, even if present illegally, are still "persons" entitled to due process).

Aliens who are physically present in the United States may be deemed "excludable," giving rise to an "entry fiction" under such aliens are to be treated as if detained at the border despite their physical presence in the United States. This status determines the aliens' rights with regard to immigration and deportation proceedings. It does not limit the right of excludable aliens detained within United States territory to humane treatment. The Fifth Circuit has held that "whatever due process rights excludable aliens may be denied by virtue of their status, they are entitled under the due process clauses of the fifth and fourteenth amendments to be free of gross physical abuse at the hands of state or federal officials." *Lynch v. Cannatella*, 810 F.2d 1363, 1372-74 (5th Cir. 1987); *see also Rosales-Garcia v. Holland*, 322 F.3d 386, 409 (6th Cir. 2003) (*en banc*) ("If excludable aliens were not protected by even the substantive component of constitutional due process,…we do not see why the United States government could not torture or summarily execute them. Because we do not believe that our Constitution could permit persons living in the United States…to be subjected to any government action without limit, we conclude that government treatment of excludable aliens must implicate the Due Process Clause of the Fifth Amendment."); *Maldonado v.*

Macias, 150 F. Supp. 3d 788 (W.D. Tex. 2015) ("[I]t is clear that aliens—even inadmissible aliens—are entitled to some constitutional protections, including some amount of due process.").

It is true that Supreme Court precedent from the 1950s held "that detention of aliens pending exclusion does not violate the aliens' constitutional rights." *Gisbert v. United States Attorney Gen.*, 988 F.2d 1437 (5th Cir. 1993) (describing *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953)). A number of courts have doubted *Mezei*'s continued viability in light of intervening precedent, however,[2] and the Sixth Circuit, en banc, declared, "We could not more vehemently disagree" with the Government's contention "that the detention of excludable aliens cannot raise constitutional concerns because such detention 'does not implicate the Fifth Amendment.'" *Rosales-Garcia*, 322 F.3d at 409.

Although the Supreme Court has recently discussed *Mezei*, it did not reaffirm it, and at least two justices made clear their understanding that "both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious," and that due process requires "adequate procedures to review their cases, allowing persons once subject to detention to show that through rehabilitation, new appreciation of their responsibilities, or under other standards,

[2] *See, e.g.*, *Rosales-Garcia*, 322 F.3d at 413-15 (noting that "the *Mezei* Court explicitly grounded its decision in the special circumstances of a national emergency and the determination by the Attorney General that Mezei presented a threat to national security," and finding that "the Court's implicit conclusion in *Mezei* is eclipsed by the conclusion drawn from the *Salerno* line of cases that the indefinite detention of excludable aliens does raise constitutional concerns.").

they no longer present special risks or danger if put at large." *Zadvydas*, 533 U.S. at 721 (Kennedy, J., dissenting, joined by Chief Justice Rehnquist). Consequently, while inadmissible aliens may unquestionably be held in certain circumstances pending or following a final order, that detention is subject to constitutional limits of reasonableness and fair treatment.

2. Agency discretion is limited

Congress has given the Department of Homeland Security and its predecessor the Immigration and Naturalization Service discretion to determine whether an alien may be detained, and under what circumstances she may be released. However, agency discretion is not unbounded; it is constrained by statutory and regulatory provisions and case law.

The former INA § 242(c) (the Immigration and Nationality Act, or the Act), as it existed at the time Mrs. Momin was ordered excluded *in absentia* in 1993, allowed the agency to detain or release an alien subject to a final order of deportation[3] for the six-month period following the date of the order, while the Attorney General effected the alien's departure from the United States. 8 U.S.C. § 1252(c) (Lexis 1993). However, such authority was subject to strict limitations, including the alien's right to habeas review of her detention: "Any court of competent jurisdiction shall have authority to review or revise any determination

[3] Although aliens were divided into categories as to "excludability" and "deportability," the physical act of removal was termed "deportation" as to both. *See, e.g.*, 8 U.S.C. § 1226(a) (providing an inquiry officer with the authority "to determine whether an arriving alien…shall be allowed to enter or shall be excluded and deported.").

of the Attorney General concerning detention, release on bond, or other release" during the statutorily provided six-month deportation period if can be shown "in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure." *Id.*

Prior to such final order, the Attorney General was directed to detain excludable aliens, 8 U.S.C. § 1225(b) (Lexis 1993), although he was also permitted to, "in his discretion, parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States." 8 U.S.C. § 1182(d)(5) (Lexis 1993). The regulations interpreting this statute cabined this discretion accordingly, commanding that "the district director *should consider the following*":

> (1) The parole of aliens who have serious medical conditions in which continued detention would not be appropriate would generally be justified by "emergent reasons";
>
> (2) The parole of aliens within the following groups would generally come within the category of aliens for whom the granting of the parole exception would be "strictly in the public interest," provided that the aliens present neither a security risk nor a risk of absconding: … (iii) Aliens who have close family relatives in the United States…who are eligible to file, and have filed, a visa petition on behalf of the detainee….

8 C.F.R. § 212.5 (Lexis 1993) (emphasis added).

Therefore, the regulatory landscape in effect at the time Mrs. Momin's exclusion order was issued provided that, while an alien could be detained during

exclusion proceedings, "serious medical conditions" that meant that "continued detention would not be appropriate" constituted grounds for release on parole. Following the exclusion order, if any, the agency could either release or detain the alien, but such detention was subject to review by a court under the writ of habeas.

Post-IIRIRA law, which was operative on the date of Mrs. Momin's 2016 arrest and detention, instructs the Attorney General to detain an alien during the removal period, which is defined in INA § 241(a)(1) as 90 days from the date the order of removal becomes administratively final. INA § 241(a)(2), 8 U.S.C. § 1231(a)(2) (Lexis 2016). Such detention is not subject to discretion. Before such an order is issued, "aliens seeking admission" who are not immediately sent back "shall be detained" during removal proceedings. 8 U.S.C. § 1225(b)(2)(A). The DHS regulations interpret this statute to mean that such individuals generally may not be released on bond, 8 C.F.R. § 236.1(c)(2), unless there are "urgent humanitarian reasons or significant public benefit[s]" at stake, in which case the Attorney General may temporarily parole the individual into the United States, provided that she presents neither a danger to the public nor a risk of flight. 8 U.S.C. § 1182(d)(5)(A).

The regulatory regime prevents such parole decisions from being "appealed to IJs or courts. This lack of review has proven especially problematic when immigration officers have denied parole based on blatant errors...." *Rodriguez*, 804 F.3d at 1081.

In sum, the agency's discretion to release an alien under the post-IIRIRA law is reduced, both prior to and following issuance of a final order—as is any review (judicial or administrative) of that decision. Nevertheless, even in this more restrictive, post-IIRIRA regime, the immigration officer is still required to assess any "urgent humanitarian reasons" presented by the individual's case. Furthermore, the case law cited in *Rodriguez* requires individualized bond hearings in addition to the immigration officer's review when the detention becomes constitutionally unreasonable.

B. Mrs. Momin's detention violates her substantive due process

Mrs. Momin is being detained—with no justification as to flight risk or dangerousness—despite a potentially fatal and rapidly progressing medical condition, while being denied life-saving medical treatment. The detention decision applies the wrong body of law, contravenes the IJ's binding decision, and ignores the regulatory factors that are required by law to inform the determination. Her detention thus violates both her substantive and procedural due process rights.

"So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience' or interferes with rights 'implicit in the concept of ordered liberty.'" *United States v. Salerno*, 481 U.S. 739, 746 (1987). While old law from this circuit has held that detention of excludable aliens in and of itself does not violate their constitutional rights, it carves an exception for claims regarding the conditions of confinement and mistreatment. *See, e.g.*, *Gisbert*, 988 F.2d at 1441 (noting that the plaintiffs "do not complain about the

conditions of that detention or claim that they are subject to corporeal mistreatment"); *Lynch*, 810 F.2d at 1374 ("whatever due process rights excludable aliens may be denied by virtue of their status, they are entitled under the due process clauses of the fifth and fourteenth amendments to be free of gross physical abuse at the hands of state or federal officials.").[4]

All individuals are entitled to "humane conditions of confinement," which means, among other things, that "prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994).[5] This is true of immigration detainees as well as citizens. *Edwards v. Johnson*, 209 F.3d 772, 778 (5th Cir. 2000).

Inmates' rights are violated when "(1) the deprivation is objectively and sufficiently serious such that the act or omission results in the denial of 'the minimal civilized measure of life's necessities' and (2) the official had a culpable state of mind." *Cruz-Hernandez v. Johnson Cty. Det. Ctr.*, Civil Action No. 3:16-CV-220-M-BH, 2017 U.S. Dist. LEXIS 13799, at *14-16 (N.D. Tex. 2017) (quoting *Farmer*, 511 U.S. at 834). The official has a "culpable mind" if he acts

[4] Furthermore, as this case law is predicated on *Mezei*, and does not take into account the developments regarding the unconstitutionality of indefinite detention set out in *Zadvydas* and other cases, it also may be of limited precedential value even for the principle that detention itself cannot violate an excludable alien's due process rights.

[5] Mrs. Momin respectfully notes that *Farmer* considered an inmate's rights under the Eighth Amendment, while the due process clause governs immigration detainees' constitutional claims. *Edwards v. Johnson*, 209 F.3d 772, 778 (5th Cir. 2000). However, the same standard applies. *Id.* (stating that immigration detainees and pretrial detainees share the same rights); *Gibbs v. Grimmette*, 254 F.3d 545, 548 (5th Cir. 2001) ("This Court has recognized that there is no significant distinction between pretrial detainees and convicted inmates concerning basic human needs such as medical care.") (citing *Hare v. City of Corinth, MS*, 74 F.3d 633, 643 (5th Cir. 1996) (en banc)).

with "deliberate indifference," such as when he "knows of and disregards an excessive risk to inmate health or safety." *Farmer*, 511 U.S. at 834-37.

Refusing to treat a serious medical condition meets this standard. *Domino v. Tex. Dep't of Crim. Justice*, 239 F.3d 752, 756 (5th Cir. 2001) ("the plaintiff must show that the officials 'refused to treat him, ignored his complaints,...or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs.'") (quoting *Johnson v. Treen*, 759 F.2d 1236, 1238 (5th Cir. 1985)).

Mrs. Momin has been diagnosed with a breast tumor that is "highly suggestive of malignancy." App. at 87. At least two separate physicians have urged her to remove the tumor without delay. App. at 89-90. Breast cancer is eminently survivable with swift action; 98.8% of individuals who catch and treat tumors early will survive them. If left untreated, however, malignant tumors spread to other tissues, making the condition much harder to treat: the survival rate of breast cancer drops to 26.3% after metastasis. Lack of treatment, then, "is objectively and sufficiently serious such that the act or omission results in the denial of 'the minimal civilized measure of life's necessities'"—indeed, it risks transforming what should be a limited period of detention into a death sentence. *Farmer*, 511 U.S. at 834.

Respondents have responded to this threat with deliberate indifference. Mr. Contreras "knows of...[the] excessive risk to inmate health," *id.* at 834-37; counsel informed him of Mrs. Momin's condition as early as November, and have

provided him with great detail since. Mrs. Momin has also informed prison staff that her tumor is growing and becoming increasingly painful. To date, the prison has responded by offering her Tylenol. Apparently Respondents believe this is all that is required, as the January 19 denial states only that "her medical condition is treatable by DHS medical staff and she has refused treatment." App. at 72. It is unclear what Mr. Contreras believes Mrs. Momin's condition to be, or whether prison or DHS medical staff are in a position to surgically remove tumors, as DHS has ignored all requests to disclose Mrs. Momin's medical records from her detention. App. at 80-82. Mrs. Momin and medical team are desperate to treat her cancer immediately, and her family is willing to assume the full cost of treatment and care. In fact, they have arranged for essential medical appointments, one of which the ICE has already ignored. App. at 83, 91-92.

It appears clear from Respondents' complete lack of communication with Mrs. Momin, her family, her doctors, and her counsel regarding this issue that they will continue to refuse treatment. They have also determined to keep her confined during the pendency of her exclusion proceedings, which could take months, if not years, as Mrs. Momin is eligible to adjust her status to lawful permanent resident and her application to do so is pending before CIS. App. at 101-05. Meanwhile, her tumor continues to develop rapidly.

This deliberate indifference to her medical situation violates her rights of substantive due process.

C. Mrs. Momin's detention violates her procedural due process

The detention is also procedurally unreasonable, as the agency has violated the laws and regulations governing discretion.

1. Aliens have a due process right to the procedures afforded by statute and regulation

"When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. This requirement has traditionally been referred to as 'procedural' due process." *Salerno*, 481 U.S. at 746.

Excludable aliens are constitutionally entitled to whatever procedural rights are set out by law. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (holding that due process for excludable aliens consists of "[w]hatever the procedure authorized by Congress is."); *Gisbert*, 988 F.2d at 1442-43 (holding that excludable aliens' rights "are determined by the procedures established by Congress"). Congress and the Attorney General may not have been obligated to create process for aliens, but to the extent that they have, those processes must be followed. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266-68 (1954) ("[W]e object to the Board's alleged failure to exercise its own discretion, contrary to existing valid regulations.").

The Fifth Circuit has explained, "The petitioners' interest in immigration parole is created by the immigration statutes and is subject to the exercise of discretion by the Attorney General. *Gisbert*, 988 F.2d at 1443 (internal citations

omitted). The court went on to note that "[t]he Attorney General's implicit authority to detain excludable aliens is not unlimited," but bounded by the statute. *Id.* at 1446 (quoting 8 U.S.C. § 1227(a)). The agency "complied with this provision by instituting procedures to review each alien's case." *Id.* Because in that case there was no suggestion that these procedures were not followed, there was no due process concern. *Id.* at 1443-44.

Here, by contrast, Mrs. Momin does challenge the agency's failure to follow the procedures set out by law. The detention decision (1) applies the wrong body of law; (2) ignores the factors that should have governed the determination; and (3) impermissibly contravenes the IJ's findings. Consequently, it violates Mrs. Momin's procedural due process.

a. The detention decision applies the wrong body of law

First, Mr. Contreras's letter does not directly address the issue of what law authorizes Mrs. Momin's detention: 1993 or present, pre- or post-order. As explained above, a very different statutory and regulatory scheme governs each of these four categories.

Mr. Contreras appears to assume that the current law applies, as the letter cites the current regulatory provisions for parole. App. at 72 (citing 8 C.F.R. § 212.5(b)). However, arguably her case is actually governed by the law as it was in 1993. IIRIRA itself provides that its permanent provisions apply only to removal proceedings commenced after its enactment, IIRIRA § 309(c)(1), and the Fifth Circuit has applied it accordingly. *Enriquez-Gutierrez v. Holder*, 612 F.3d 400,

408 (5th Cir. 2010) ("Section 309(c)(1)(A) of IIRIRA establishes that, subject to certain exceptions not applicable here, 'in the case of an alien who is in exclusion or deportation proceedings as of the…effective date [of the Act],…the amendments made by this subtitle shall not apply.'") (quoting 110 Stat. at 3009-625); *Perez v. Reno*, 227 F.3d 294, 294 (5th Cir. 2000) ("These changes do not apply, however, to aliens placed in exclusion proceedings before April 1, 1997, and judicial review of such proceedings is conducted under the pre-IIRIRA statutory scheme."); *Hose v. INS*, 180 F.3d 992, 994 (9th Cir. 1999) (en banc) ("Pre-IIRIRA law applies to cases in which a final deportation or exclusion order was filed on or before October 30, 1996."). Consequently, Mr. Contreras applied the wrong body of law, with the wrong presumptions and balance of factors.

b. The detention decision ignores the factors that should have governed the decision

The applicable 1993 regulation contains specific instructions as to which factors the district director should consider when determining whether or not aliens will be paroled out of detention. 8 C.F.R. § 212.5(a) (1993). Relevant here are (1) aliens who have serious medical conditions, and (2) aliens for whom granting parole would be "strictly in the public interest," provided they present neither a security risk nor a risk of absconding, including (iii) aliens whose close relatives have filed a qualifying visa petition on behalf of the detainee. *Id.*

Mr. Contreras's letter does not indicate that he considered each of these factors.

There is no statement or any indication that he weighed Mrs. Momin's approved I-130 visa petition from her son. There is no statement or any indication that he considered the impact of her detention on her two U.S. citizen sons, her husband, her U.S. citizen father, or her lawful permanent resident mother.

Most important, there is no indication that he seriously considered the danger of her health situation. At no point does the letter name Mrs. Momin's medical condition, or explain why detention continues to be appropriate in light of her need for surgery. Instead, it repeats the spurious claim that she has refused treatment. App. at 72. As undersigned counsel's rebuttal letter related to Mr. Contreras, DHS medical staff "have not taken [Mrs. Momin] to a clinic for an exam or a re-exam, to an imaging facility for a mammogram or ultrasound, or to a surgical center for removal of the suspicious mass...." App. at 78. Nor have they offered to perform any of these steps. Their sole offer of treatment is over-the-counter pain medications.

Even if current law did apply, the decision indicates that Mr. Contreras misapprehended its provisions. He wrote, "in order to be considered for parole, aliens must establish that they are described in one or more of the five categories set forth in section 212.5(b) of Title 8 of the Code of Federal Regulations (C.F.R.)...." App. at 72. The very first of these categories is "Aliens who have serious medical conditions in which continued detention would not be appropriate." 8 C.F.R. § 212.5(b). Again, the letter does not meaningfully engage with this factor.

Texas district courts have found that immigration decisions predicated on erroneous interpretations of the law result in fundamental unfairness. *United States v. Girosky-Garibay*, 176 F. Supp. 2d 705 (W.D. Tex. 2001); *United States v. Ojeda-Escobar*, 218 F. Supp. 2d 839 (W.D. Tex. 2002). And the Fifth Circuit has held the "question of whether the IJ properly applied the law to the facts in determining the alien's eligibility for discretionary relief" or applied the wrong standard or improperly considered evidence "are legal and constitutional issues unrelated to the discretion reserved to the Attorney General." *De Rodriguez v. Holder*, 585 F.3d 227, 233-34 (5th Cir. 2009). Mr. Contreras's decision did not correctly cite to or engage with the factors that should have guided his discretion. It therefore violates procedural due process.

c. The detention decision opposes agency precedent and policy

Mr. Contreras's decision also directly violates the policy for the detention and removal of aliens, both as it controlled in 1993 and as it controls today.

In 1993, the agency's position on parole of excludable aliens was that "an alien, whom the Service in its discretion has arrested and taken into custody, generally should not be detained or required to post bond pending a determination of deportability except on a finding that he is a threat to the national security or is a poor bail risk." *Matter of Patel*, 15 I. & N. Dec. 666 (BIA 1976) (cited by *Matter of Ellis*, 20 I. & N. Dec. 641 (1993) and *Reno v. Flores*, 507 U.S. 292, 295 (1993)).

Current Department policy is outlined in a November 20, 2014, Memorandum issued by then-Secretary of Homeland Security, Jeh Johnson. App. at 94-99. Under this Department policy, an alien in Mrs. Momin's position does not warrant *any* level of priority. It directs field office directors to remove non-priority aliens only if removing such an alien "would serve an important federal interest," and to authorize the use of DHS detention resources only in "extraordinary circumstances" on such aliens if they are "primary caretakers of children" or their detention "is otherwise not in the public interest." App. at 98.

Both of Mrs. Momin's attorneys included copies of that Memorandum in their correspondence with Mr. Contreras, asking for Mrs. Momin's release. Mr. Contreras was also informed that Mrs. Momin is the primary caregiver of her youngest son. Yet Mr. Contreras did not refer to the Memo, and thus did not say how Mrs. Momin's circumstance is "extraordinary," how her removal "would serve an important federal interest," or on what grounds he elected to disregard the clearly stated priorities of the Department.

Mr. Contreras's decision was not guided by either common-sense statement of agency policy and precedent. It therefore violates procedural due process.

d. The detention decision contravenes the IJ's conclusion

Finally, the decision directly contravenes the binding finding of the IJ in Mrs. Momin's exclusion case. In rescinding the 1993 exclusion order, the IJ noted that the agency had mailed its undeliverable notices to Mrs. Momin at a different address than the one it had originally listed her as residing at, observed that "it is

unclear which of the two addresses is the correct address," and that "[i]t is also unclear how the government obtained the addresses listed on the Form-122 and Form I-546 as the record reveals that when Respondent presented herself for inspection, there was no Gujarati interpreter available 'and no statement was taken due to the unavailability of [an] interpreter.'" App. at 58-59. The court concluded, "[t]hese findings are causing the Court to question the accuracy of the address listed on the charging document, Form I-122." As a result, the IJ found that Mrs. Momin "established reasonable cause for her absence from the proceedings." App. at 59.

Mr. Contreras's letter entirely contravenes this finding, which is binding on the immigration proceedings. The detention decision is predicated in large part on the assertion that "Mrs. Momin poses a flight risk as she has absconded from her exclusion order for more than 20 years." App. at 72. This disregards the IJ's order that she had no notice of the opinion, as it is not logically possible to abscond from an order one does not have any idea was issued.

Mrs. Momin respectfully notes that the "law of the case" doctrine applies with full force in immigration proceedings, *Zhang v. Gonzales*, 434 F.3d 993, 998 (7th Cir. 2006) ("the applicability of the doctrine has been recognized in the Operating Policies & Procedures Memoranda (OPPM) of the Office of the Chief Immigration Judge, United States Department of Justice Executive Office of Immigration Review. That OPPM declares that 'the law of the case doctrine is consistent with all existing immigration laws and regulations,' and that it 'shall

apply' where there has been a change in venue.") (internal citation omitted), and that a DHS official has no authority to override the decision of an immigration judge.

Furthermore, Mr. Contreras declined to evaluate the full record. His letter referred to a "comprehensive review of her A-file," but Mr. Contreras did not consider evidence submitted by Mrs. Momin's second attorney; he considered only the requests from Mrs. Momin's first attorney. If he had, he would have avoided the errors laid out in this petition.

2. These violations prejudiced Mrs. Momin, causing her significant harm

The clearest conclusion that can be drawn from the case law governing detention of foreign nationals is that individualized bond hearings are essential for protecting the individuals' right to due process. For Mrs. Momin, this hearing must occur very early in the detention, as waiting for a presumptively reasonable time to pass, and then for a federal court to rule on a petition for habeas corpus, could have irreversible, irreparable, even fatal consequences.

The *Mathews* test is the means by which the process due to a person is determined. It calls for weighing the private interest affected by the official action against the Government's asserted interest and the burdens the Government would face in providing greater process. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Mrs. Momin's private interests are as compelling as can be: her diagnosis and treatment of suspected breast cancer were interrupted by her arrest and

detention, and she languishes in custody instead of obtaining critically needed surgery and essential follow-up treatment.

By contrast, the Government's asserted interests—appearance at future proceedings, protection of society—are not compromised by her release. She is not a flight risk and has never been a flight risk; she has been living in Houston since 1993, as the immigration agency well knew, and there is no indication that she ever knowingly evaded immigration authorities. On the contrary, she was apprehended because she willingly approached the agency to try to regularize her status, after her previous attempt to do so was denied through no fault of her own after the agency's seven-year delay. App. at 28-29. Furthermore, she has been granted employment authorization from the agency every year since 2004, she owns her own home where she lives peacefully with her husband and U.S. citizen sons, and her father is a citizen and her mother a permanent resident. With no criminal record and not a whisper that she is a threat to national security, the agency cannot (and does not) claim her release would endanger society.

The burden of an individualized bond hearing pales in comparison to the burden this housewife and mother bears being detained and being denied access to her doctors and her family.

> Bond hearings do not restrict the government's legitimate authority to detain inadmissible or deportable non-citizens; rather, they merely require the government to "justify denial of bond" with clear and convincing "evidence that an alien is a flight risk or danger to the community."

Rodriguez, 804 F.3d at 1077 (internal citation omitted).

The balance of factors clearly tilts toward a bond hearing in this case.

D. Habeas should issue to remedy this denial of due process

"All aliens within the United States, 'whether their presence here is lawful, unlawful, temporary, or permanent,' are entitled to procedural fairness." *Ali v. Mukasey*, 529 F.3d 478, 490 (2d Cir. 2008) (citing *Zadvydas*, 533 U.S. at 693). At a minimum, Mrs. Momin "must be afforded the opportunity to be heard at a meaningful time and in a meaningful manner." *Burger v. Gonzales*, 498 F.3d 131, 134 (2d Cir. 2007) (internal quotation marks omitted). "The Fifth Circuit has held that when a defendant is denied the opportunity to be heard and to present evidence, the Due Process Clause may be implicated." *United States v. Zaragoza*, No. SA-03-CR-0478-XR, 2004 U.S. Dist. LEXIS 3137, at *12 (W.D. Tex. 2004) (citing *Toscano-Gil v. Trominski*, 210 F.3d 470, 474 (5th Cir. 2000)).

These principles have led another Texas district court to impute "a reasonable time limitation" to detention under § 1225(b)(2)(A)—the same statute Mr. Contreras appears to believe justifies Mrs. Momin's imprisonment. It is worth quoting the opinion at length:

> [U]nder this regulatory scheme, arriving alien asylum applicants may be detained for years with no opportunity for an individualized review to determine the appropriateness such prolonged detention. The holdings of *Zadvydas* and *Demore* cannot be read to condone such a result. Indeed, the holding of *Demore* condoned mandatory detention only for aliens in expedited removal....
>
> One of the issues with placing Petitioner in the same category as aliens who have committed crimes abroad and aliens who have entered illegally or violated the terms of their visas, is that Petitioner—like all aliens detained under § 1225(b)(2)(A)—has no way of obtaining an individualized review

> of his custody determination. Both the *Zadvydas* Court and the *Demore* Court explained that there are two justifications for immigration detention—(1) ensuring the appearance of aliens at future immigration proceedings, and (2) preventing danger to the community. Yet Petitioner has never had a hearing to determine if these two justifications do, in fact, apply to his detention.
>
> In finding that indefinite detention without review would invoke constitutional concerns, the *Zadvydas* Court took into account not only the justifications for immigration detention, but also looked to the lack of procedural protections for the aliens' right to be free from physical restraint. In deciding to read a reasonableness limitation into the statute to avoid a constitutional problem, the *Zadvydas* Court noted that administrative proceedings were not sufficient to protect the aliens from the indefinite deprivation of liberty: "... This Court has suggested, however, that the Constitution may well preclude granting an administrative body the unreviewable authority to make determinations implicating fundamental rights. The Constitution demands greater procedural protection even for property...."

Maldonado, 150 F. Supp. 3d at 806-07 (internal citations omitted).

And a court in this district invalidated the regulation preventing IJ review of detention decisions, noting that under the regulation "a CBP officer basically has unreviewable discretion," and declaring, "Unchecked power is not something our laws allow, for it could lead to the creation of a rogue department unbridled by constitutional checks and balances." *Garza-Garcia*, 539 F. Supp. 2d at 907-08 (finding 8 C.F.R. § 1003.19(h)(2)(ii) to be "arbitrary, capricious and contradictory to the statute"). *See also Ramirez*, 2010 U.S. Dist. LEXIS 142508, at *1 ("Petitioner's continued detention without an individualized finding as to risk of flight or danger to community is unreasonable.").

The common factor in the detention cases cited above is the courts' focus on whether the detention of the particular alien was reasonable in light of the

case's particular facts. Magistrate Judge Recio specifically concluded that determining reasonableness is a fact-intensive inquiry. "The circumstances and claims of each specific detainee will govern the outcome of any reasonableness inquiry." *Id.* at *52.

In other words, the reasonableness of detention varies with the circumstances. Here, Mrs. Momin was moved into a different classification (from post-order to pre-order removal once her *in absentia* exclusion order was rescinded). The potentially protracted detention that will result as exclusion proceedings grind on for months or years. This, combined with the urgency of her situation, render the lack of review of her detention unreasonable.

For Mrs. Momin, the denial of due process may result not only in the deprivation of her liberty, but also of her life. For that reason, the Writ must issue.

VII. PARYER FOR RELIEF

Mrs. Momin should be released on parole, returning her to the status she held for the twenty-two years prior to her arrest—an arrest based on an unconstitutionally issued order of exclusion. Alternatively, an individualized hearing would protect the Government's interests while allowing Mrs. Momin the opportunity to be heard. The appropriate venue for such a hearing is this Court for two reasons.

First, Immigration Judges do not have jurisdiction to redetermine agency custody determinations of aliens in exclusion proceedings, 8 C.F.R.

§ 1003.19(h)(2)(i)(A), so it is not possible to remand to the Immigration Judge for a bond hearing.

Second, remand to the agency to review Mrs. Momin's continued detention is not appropriate given its history of failing to accept the IJ's findings, refusing to consider evidence before it, applying the wrong law, failing to consider legally mandated factors, and ignoring Department policy and agency precedent. The ICE field office director position is politically unresponsive, and the sole means of reviewing its decision is through a petition for habeas; thus, should the director again fail to properly apply the law, Mrs. Momin will have no choice but to re-petition this Court.

For these reasons, and on each of these grounds, Petitioner Roshan Akbar Momin respectfully prays as follows:

THAT this Court declare that Mrs. Momin's detention as an alien with a final order of exclusion outstanding is *ultra vires* as that order has been vacated; and

THAT this Court order the immediate release of Mrs. Momin, with or without bond or conditions, in order to permit her to obtain urgently needed medical treatment and to pursue her application for adjustment of status; or, in the alternative

THAT this Court conduct an individualized bond hearing for Mrs. Momin to determine if she merits release on parole pending the outcome of her exclusion hearing;[6] and

THAT Mrs. Momin be awarded costs and attorney's fees pursuant to the Equal Access to Justice Act, Title 28 U.S.C. § 2412, and any other applicable laws, and;

FOR such further and other relief as this Honorable Court may deem just and necessary.

Dated: February 22, 2017,

Respectfully Submitted,

/s/ Simon Azar-Farr
Simon Azar-Farr
Attorney in Charge
District Federal ID Number: 19787
Texas Bar Number 00795953
SIMON AZAR-FARR & ASSOCIATES

(San Antonio Office)
2313 North Flores
San Antonio, TX 78212

(Houston Office)
1220 West Gray Street
Houston, Texas 77019

Telephone (210) 736-4122
Facsimilie (210) 736-4143

[6] This Court will note that other courts in this district have found that for reasons of expediency and jurisdiction this review should be undertaken by the district court rather than the immigration judge. *See, e.g., Ramirez*, 2010 U.S. Dist. LEXIS 142508, at *75-76.