United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JOSE OMAR BELLO REYES,

Petitioner,

v.

KEVIN MCALEENAN, et al.,

Respondents.

Case No. 19-cv-03630-SK

ORDER DENYING PETITION FOR WRIT OF *HABEAS CORPUS*

Regarding Docket Nos. 1, 16

On June 21, 2019, Jose Omar Bello Reyes ("Petitioner") filed with this Court a petition for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2241 and Art. I § 9, cl. 2 of the United States Constitution. (Dkt. 1.) The Court issued an order to show cause why the petition should not be granted on July 3, 2019 (Dkt. 12), and on July 8, 2019, Respondents filed their opposition to the petition. (Dkt. 16.) On July 11, 2019, Petitioner filed a traverse. (Dkt. 17.) The Court heard oral argument on July 15, 2019. Having considered the submissions of the parties and the relevant legal authority, the Court HEREBY DENIES the petition, for the reasons set forth below.

A. Background.

Petitioner entered the United States in 2000, when he was 3 years old. (Dkt. 1) Now 22 years old, Petitioner is himself the father of a one-year-old son, a United States citizen. (Dkt. 1-1.) Before his detention, Petitioner was employed full time as a farmworker and was pursuing higher education by taking evening classes at Bakersfield College. (Dkt. 1.) Immigration and Customs Enforcement ("ICE") initially arrested Petitioner on May 22, 2018; the same day, he was issued a notice to appear, which commenced removal proceedings against him pursuant to 8 U.S.C. § 212(a)(6)(A)(i)(I). (Dkt. 16-1.) After the May 22 arrest, ICE detained Petitioner without bond. (*Id.*) Petitioner moved the immigration judge to supersede the bond decision, and after a hearing the immigration judge set a bond of $10,000 on August 22, 2018. (Dkt. 1-3.) Community groups

rallied around Petitioner, securing funds for his legal fees and bond payment. (Dkt. 1.) Once released, Petitioner returned to work and school. (*Id.*)

On July 25, 2018, Petitioner submitted an application for cancellation of removal based on hardship to his United States citizen son. (Dkt. 1-1.) In support of his application, Petitioner submitted academic records showing excellent grades and several letters of support from his college professors, who note his excellent character, hard work, outstanding academic performance, bright potential, and engagement in the community. (*Id.*) Petitioner also has an application for a "U visa" as the cooperating victim of a violent crime, and that application is also pending with the federal government pursuant to 8 C.F.R. § 214.14. (Dkt. 1.) Respondents submit a long list of juvenile infractions by Petitioner. (Dkts. 16, 16-2.) Yet Petitioner's letters of support include one from his professors at the California Youth Correctional Facility, who observed his excellent work ethic, thoughtfulness, and commitment to helping others during her time teaching him in 2015 and 2016. (Dkt. 1-2.) Petitioner's juvenile probation terminated and his juvenile record was sealed as of June 28, 2018. (Dkt. 1-2.)

On January 29, 2019, fewer than five months after his release from ICE custody on bond, Petitioner was arrested for driving under the influence of alcohol ("DUI"). (Dkt. 16-3.) After the California Superior Court issued a bench warrant for his arrest, Petitioner appeared, pled *nolo contendere*, was convicted on April 11, 2019, and was sentenced to 5 days in jail with a requirement that he complete a DUI program. (Dkt. 16-4.)

After his initial release from ICE detention, Petitioner had also begun publicly decrying ICE's policies and practices regarding detention and deportation. (Dkt. 1.) He spoke out against ICE at a public rally on September 27, 2018, spoke again at another public forum in the fall of 2018, made an anti-ICE statement before the Kern County Board of Supervisors on December 11, 2018, led a workshop for DREAMers[1] on April 5, 2019, and facilitated a panel discussion on

[1] The Development, Relief, and Education for Alien Minors Act (the "DREAM" Act) is legislation designed to provide a pathway to legal status for undocumented immigrants brought to the United States as children. Various versions of the DREAM Act have been before Congress, the first appearing in 2001, though none have passed. Since introduction of the first DREAM Act, young undocumented immigrants seeking a pathway to legal status have been commonly referred to as "DREAMers." *See* American Immigration Council, *Fact Sheet: The Dream Act, DACA, and*

immigration enforcement on April 25, 2019. (Dkt. 1.) On May 13, 2019, the Kern County Board of Supervisors held a public forum regarding local law enforcement's cooperation with ICE, as required under the California Transparent Review of Unjust Transfers and Holds ("TRUTH") Act. (*Id.*) At this videotaped, livestreamed, and widely publicized event, Petitioner read a poem. (*Id.*) Titled "Dear America," the poem critiques the current administration's policy on immigration as racist and inhumane. (*Id.*) Fewer than 36 hours after Petitioner read his poem at the forum, ICE agents detained him as he was leaving his home. (*Id.*)

ICE set an administrative bond at $50,000. (Dkt. 16-4.) Petitioner alleges that when the arresting officer informed him that his bond had been set at $50,000, the officer mocked him, saying: "We'll see if you can get your friends to raise the bond money again." (Dkt. 1.) Respondents do not dispute this fact by declaration; however, at oral argument Respondents' counsel stated that Respondents affirmatively deny all allegations in the original *habeas* application. To date, petitioner remains in custody and has not requested a hearing for bond redetermination before an immigration judge. (Dkt. 16.) Petitioner argues that his arrest was unconstitutional retaliation for speech protected under the First Amendment. He also argues that the amount of his bond is unreasonably high and not correlated to his means, and that the bond was set at the high rate based on the same retaliatory motive.

B. Legal Standards.

Federal district courts are empowered to consider applications for *habeas corpus* relief pursuant to 28 U.S.C. § 2241 and Art. I § 9, cl. 2 of the United States Constitution. This remains true even when a statute – like the Immigration and Nationality Act ("INA") at issue here – purports to strip courts of jurisdiction over decisions typically left to the discretion of the executive branch. *Singh v. Holder*, 638 F.3d 1196, 1202 (9th Cir. 2011) ("claims that the discretionary process itself was constitutionally flawed are 'cognizable in federal court on habeas because they fit comfortably within the scope of § 2241.'") (citation omitted). Similarly, the INA

Other Policies Designed to Protect Dreamers June 3, 2019 (available at https://www.americanimmigrationcouncil.org/research/dream-act-daca-and-other-policies-designed-protect-dreamers.)

"does not limit habeas jurisdiction over questions of law." *Id.*

Section 2241 does not specifically require petitioners to exhaust direct appeals before filing petitions for *habeas corpus*. *Laing v. Ashcroft*, 370 F.3d 994, 997 (9th Cir. 2004). However, courts typically impose a prudential exhaustion requirement prior to hearing *habeas* petitions. *Id.* at 997-98. "Although courts have discretion to waive the exhaustion requirement when it is prudentially required, this discretion is not unfettered." *Id.* at 998. Findings that the exhaustion requirement has been waived are properly limited to situations "where administrative remedies are inadequate or not efficacious, pursuit of administrative remedies would be a futile gesture, irreparable injury will result, or the administrative proceedings would be void." *Id.* at 1000 (quoting *S.E.C. v. G.C. George Sec., Inc.*, 637 F.2d 685, 688 (9th Cir. 1981)).

Historically, *Mt. Healthy* has supplied the legal standard for First Amendment retaliation claims. *Mt. Healthy City School Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977). In that case, the Supreme Court held that a claim for retaliatory action based on protected speech would fail – even where the protected speech played a substantial part in the allegedly retaliatory action – if the victim of the alleged retaliation could not demonstrate that the same decision would not have been reached absent the protected speech. *Id.* at 285; *see also Hartman v. Moore*, 547 U.S. 250, 260 (2006).

On May 28, 2019, the Supreme Court issued a new opinion in the context of retaliation based on exercise of First Amendment rights. *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019). The plaintiff in *Nieves* brought a claim under 42 U.S.C. § 1983 alleging that he was arrested at a winter sports festival in retaliation for his speech warning other festival attendees not to speak with the police. *Id.* at 1720-21. The Court held that the "presence of probable cause should generally defeat a First Amendment retaliatory arrest claim." *Id.* at 1726. "Because there was probable cause" for the arrest in *Nieves*, the "retaliatory arrest claim fails as a matter of law." *Id.* at 1728. The Court created "a narrow qualification" to this rule "where officers have probable cause to make arrests, but typically exercise their discretion not to do so." *Id.* at 1727. If a plaintiff can show "that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been," then he can maintain his claim for retaliatory arrest even if

the arrest was based on probable cause. *Id.*

An immigrant subject to removal proceedings "may be arrested and detained pending a decision on whether" that person "is to be removed from the United States." 8 U.S.C. § 1226. The Attorney General "may continue to detain the arrested" person and may issue or revoke a related bond at any time. *Id.* The INA further provides that the Attorney General "shall take into custody" any such person who is inadmissible by reason of having committed certain crimes. *Id.* ICE regards impaired driving as a "significant misdemeanor" and has long held the policy that impaired driving triggers administrative arrest. (Dkts. 16-6, 16-7.) Administrative bonds set by ICE are subject to review by an immigration judge. 8 C.F.R. § 1003.19.

C. Analysis.

This Court has jurisdiction to consider the constitutional and legal questions Petitioner raises in his application for habeas relief. *Singh*, 638 F.3d at 1202.

Petitioner raises his constitutional claim for retaliation based on protected speech as to two distinct issues. First, Petitioner asserts that his re-arrest and detention by ICE following his reading of his poem at the Kern County Board of Supervisors forum was retaliation for his exercise of his First Amendment right to speech. Second, Petitioner asserts that ICE's administrative decision to set bond in the amount of $50,000 was retaliatory because it did not take his means and circumstances into account and arises from the same events. The Court will address each in turn.

1. Re-arrest and Detention.

As to Petitioner's constitutional claim regarding his re-arrest and detention by ICE after the reading of his poem, the Court holds that the requirement of prudential exhaustion is waived. The Supreme Court has observed that "[c]onstitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions." *Califano v. Sanders*, 430 U.S. 99, 109 (1977). Petitioner's claim that his arrest and detention are unlawful lies outside the jurisdiction of immigration judge, who is limited to considering a certain set of factors at a bond hearing, including flight risk and danger to the community. *See, e.g.*, *Matter of Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006). Administrative

remedies would thus be inadequate, and failure to decide the constitutionality of his re-arrest and detention would lead to irreparable harm. The Court therefore turns to the constitutionality of Petitioner's re-arrest and detention by ICE.

Nieves controls. Under the standard for retaliatory arrest articulated in *Nieves*, Petitioner's First Amendment retaliation claim fails because ICE had an objectively reasonable justification for re-arresting him and detaining him. Although the *Nieves* decision discusses an arrest by state law enforcement officers in terms of "probable cause," ICE agents are not required to show "probable cause" to arrest and detain an immigrant. The Supreme Court in addressing the "probable cause" standard reasoned that the absence of probable cause will "generally provide weighty evidence that the officer's animus caused the arrest, whereas the presence of probable cause will suggest otherwise." *Nieves*, 139 S.Ct. at 1724. The Supreme Court further noted that it has consistently held an objective standard is important because an inquiry at the threshold stage of the subjective intent of the arresting officer is "irrelevant" and does not provide a basis for invalidating the arrest. *Id.* at 1725 (internal citations omitted). Allowing litigation to proceed based on the subjective intent of the arresting officer would lead to "years of litigation" and "dampen the ardor" of officers in discharging their duties, and lead to a reduction in officers' communications during arrests to "avoid having their words scrutinized for hints of improper motive – a result that would leave everyone worse off." *Id*. (internal citations omitted).

Here, there is no dispute that, absent the retaliatory motive, ICE had an objectively reasonable legal justification to re-arrest Petitioner – even simply for his *arrest* for DUI. And there is no dispute that ICE has an objectively reasonable legal justification to re-arrest an immigrant already on bond who then is *convicted* of misdemeanor DUI. The decision to re-arrest Petitioner falls squarely within ICE's power to enforce the INA and aligns directly with its enforcement priorities. Section 1226 of the INA grants blanket discretion to arrest immigrants subject to removal and to continue their detention pending removal proceedings. 8 U.S.C. § 1226(a). Decisions regarding bonds in this context are discretionary under the statute, and the statute requires enforcement where certain crimes are at issue. 8 U.S.C. §§ 1226(b), 1226(c). ICE frequently exercises its enforcement discretion to arrest individuals arrested for DUI. (Dkt. 16-7.)

It is thus clear that ICE had an objectively reasonable legal justification to re-arrest and detain Petitioner in this case.

The Court agrees with Petitioner that the timing of ICE's decision to re-arrest Petitioner is highly suggestive of retaliatory intent. However, this is not sufficient to overcome *Nieves*' holding that, where probable cause exists, a claim for retaliatory arrest is not viable. Even under the *Mt. Healthy* standard, which Petitioner contends applies even after *Nieves*, Petitioner's retaliation claim fails. Even if Petitioner's criticism of the government played a "substantial part" in ICE's decision to re-arrest him, Petitioner has not demonstrated definitively that ICE would not have re-arrested him absent his speech. Indeed, Respondents show that conviction for DUI is one of the most common reasons for ICE arrest. (Dkt. 16-7.) Though Respondents have not addressed the timing of Petitioner's re-arrest, the controlling fact here is that Respondents had an objectively reasonable legal justification to re-arrest Petitioner regardless of when they did it, and Petitioner has shown neither that ICE would have refrained from re-arresting him absent his criticism nor that a DUI falls within the category of crimes for which a similarly situated individual who had not spoken out wound not have been re-arrested. Under both *Nieves* and *Mt. Healthy*, Petitioner's claim for retaliatory arrest fails.

At oral argument, Petitioner's counsel made several thoughtful attempts to distinguish the instant case from *Nieves*. However, the Court is not convinced that *Nieves*' holding is limited to the issue of whether probable cause vitiates only a claim for § 1983 damages as opposed to a claim in a *habeas* petition. Nothing in *Nieves* limits the holding to a claim for § 1983 damages, and precedent does not distinguish between claims based on immigration detention and those based on claims for § 1983. Indeed, *Mt. Healthy*, the source of Petitioner's preferred constitutional test, itself arose from a § 1983 claim. Petitioner argues that *Nieves* is limited to claims for § 1983 damages because the rationale for the objective test of probable cause is to limit the litigation risks to individual officers, but in this context of habeas, there is no similar risk. However, as noted above, the Supreme Court listed a concern for other factors such as the decrease in communication and effect on officers to carry out their duties because of their concern that their words will be subject to scrutiny for subjective intent. *Nieves*, 139 S.Ct. at 1724-25. Those risks occur even in

this context if the Court scrutinizes subjective intent before analyzing the objectively reasonable legal justification for the arrest.

The Court is likewise not convinced that *Nieves* distinguishes between premeditated and spontaneous arrests, or that that distinction maps onto the relationship between the speech at issue and the probable cause for the arrest. *Nieves* makes clear that a First Amendment retaliatory arrest claim fails when probable cause – an objectively reasonable legal justification for the arrest – is evident. Had Petitioner not been arrested for DUI, this would be a different case, but such facts are not before this Court.

2. $50,000 Bond

As to Petitioner's claim that ICE's administrative decision to set bond in the amount of $50,000 was retaliatory because that decision did not take his means and circumstances into account, the Court holds that Petitioner has failed to exhaust his administrative remedies and the requirements of prudential exhaustion are not waived.

As discussed above, determinations regarding bonds in immigration detention cases fall squarely within the purview of the immigration judge. 8 C.F.R. § 1003.19. Petitioner has not yet requested review of his bond by an immigration judge. Upon review, the immigration judge must consider whether the current level of bond is well tailored to Petitioner's means and circumstances in light of the government's twin regulatory purposes of preventing flight and preventing danger to the community, in keeping with *Zadvydas v. Davis*, 533 U.S. 678, 690-91 (2001). The administrative process still may be sufficient to redress Petitioner's constitutional concerns as to the bond, and if he concludes it is not, he may appeal to the Board of Immigration Appeals and then again to the district courts. Petitioner will not be irreparably harmed by first seeking an administrative remedy. Therefore, the Court finds that the requirements of prudential exhaustion are not waived as to Petitioner's claim on the $50,000 bond amount.

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D. Conclusion.

For the reasons set forth above, the Court DENIES Petitioner's application for writ of *habeas corpus*. The Clerk of Court is directed to close the file.

IT IS SO ORDERED.

Dated: July 16, 2019

SALLIE KIM
United States Magistrate Judge

United States District Court
Northern District of California