UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ARELY WESTLEY a/k/a WILSON AMILCAR VELASQUEZ-CABALLERO	*	**CIVIL ACTION**
	*	**NO. 25-229 "M" (4)**
V.	*	**JUDGE BARRY W. ASHE**
MELLISSA B. HARPER, ET AL	*	**MAGISTRATE KAREN W. ROBY**
	* *	*

RESPONDENTS' RESPONSE TO PETITIONER'S MOTION FOR TEMPORARY RESTRAINING ORDER (PRELIMINARY INJUNCTION)

Pursuant to this Court's February 1, 2025 and February 4, 2025 orders (Dkt. Nos. 7, 15), Respondents hereby file their response to Petitioner's Emergency Motion for a Temporary Restraining Order/Preliminary Injunction. Dkt. No. 2, ("TRO Mot."). The Court should deny the motion and deny preliminary injunctive relief for the reasons set forth below.

PRELIMINARY STATEMENT

Wilson Amilcar Velasquez-Caballero ("Petitioner" or "Westley")—now known as Arely Westley—was ordered removed from the United States on June 10, 2010. Shortly thereafter, Immigration and Customs Enforcement ("ICE") removed Petitioner to Honduras. Since then, Petitioner re-entered without inspection or admission on two occasions and ICE has reinstated the order of removal once. While living in the United States, Petitioner has been convicted of numerous crimes, including simple burglary of an inhabited dwelling, possession of stolen things, driving while intoxicated, bank fraud, theft, and forgery. On July 8, 2024, after Petitioner was arrested for several traffic violations, ICE took Petitioner into custody and discretionarily released Petitioner pursuant to the conditions of an Order of Supervision ("OSUP") for medical reasons. On February 1, 2025, Petitioner reported for a scheduled check-in appointment. ICE

then detained Petitioner and began processing Westley for removal to Honduras, subject to the reinstated removal order. Petitioner petitioned this Court for a writ of habeas corpus and moved for an emergency temporary restraining order seeking a stay of removal. Dkt. 1, ("Habeas Pet."); TRO Mot. In advance of a hearing on Petitioner's motion for a temporary restraining order, this Court ordered that Petitioner not be moved out of the Eastern District of Louisiana. Because ICE does not have a detention facility in that area rated for detention exceeding 48 hours, ICE was compelled to release Petitioner once more on an ankle monitor. Respondents oppose this decision and request that the TRO be lifted.

FACTS

Petitioner Arely Westley is a native and citizen of Honduras. Exh. A, ¶ 2; Exh. B, 1, 33–34. On or about April 22, 2010, Westley was encountered by the United States Border Patrol ("USBP") in New Orleans, Louisiana. Exh. A, ¶ 2; Exh. B, 33–34. Westley was placed in removal proceedings pursuant to 8 U.S.C. § 1182(a)(6)(A)(i), as an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the [government]. *Id.* On June 3, 2010, an immigration judge ordered Westley removed to Honduras. Exh. A, ¶ 2; Exh. B, 32. On June 24, 2010, Westley was removed by air to Honduras. Exh. A, ¶ 2; Exh. B, 29.

Sometime thereafter, Westley reentered the United States without being admitted or inspected by an immigration officer. Exh. A, ¶ 3; Exh. B, 15, 17. On December 27, 2011, Westley was charged in the Orleans Parish Criminal District Court with violation of La.R.S. 14:62.2, Simple Burglary of an Inhabited Dwelling, La.R.S. 14:69(b)(2), Possession of Stolen Things $500-$1000 in case number 509-982 "B", and violating La.R.S. 14:69(B)(2), Possession of Stolen Things $500-$1000 in case number 509-983 "B". Exh. A, ¶ 3; Exh. B, 39–40. On

February 2, 2012, Westley was convicted of the above charges and sentenced to seven months imprisonment. Exh. A, ¶ 3; Exh. B, 63–64.

On March 1, 2012, Westley again entered ICE custody and was issued a Notice of Intent/Decision to Reinstate Prior Order of Removal (Form I-871). Exh. A, ¶ 4; Exh. B, 27. On March 23, 2012, ICE again removed Westley to Honduras. Exh. A, ¶ 4; Exh. B, 25. Sometime thereafter, Westley again reentered the United States without being admitted or inspected by an immigration officer. Exh. A, ¶ 5; Exh. B, 2, 15, 17.

Petitioner has a significant criminal history since reentering the United States unlawfully for the second time:

- On January 17, 2014, Westley was arrested in New Orleans, Louisiana for two counts of violating La.R.S. 14:62.2, Simple Burglary of an Inhabited Dwelling. Exh. A, ¶ 5; Exh. B, 39–40. Westley was charged with those violations in the Orleans Parish Criminal District Court in case number 519-557 "L". Exh. A, ¶ 5; Exh. B, 77. In March 2014, Westley was charged with violating La.R.S. 14:72, Forgery, La.R.S. 14:71.1, Bank Fraud and 14:67(b)(2), Theft. Exh. B, 73. Westley was charged with those violations in the Orleans Parish Criminal District Court in case number 519-698 "L". Exh. A, ¶ 5; Exh. B, 73. On June 30, 2014, Westley was convicted in both cases in the Orleans Parish Criminal District Court for the offenses of Simple Burglary of an Inhabited Dwelling; Forgery; Bank Fraud; and Theft, in violation of Louisiana Revised Statues 14:62.2, 14:71.1, and 14:67(B)(2) and sentenced to 364 days imprisonment. Exh. A, ¶ 5; Exh. B, 77.
- On August 21, 2017, Westley was arrested by Kenner Police Department for municipal offenses and no disposition is recorded. Exh. A, ¶ 6; Exh. B, 40–41.

- On May 27, 2019, Westley was arrested for various traffic offenses, including La.R.S 14:100, Hit and Run Driving. Exh. A, ¶ 7; Exh. B, 40. No disposition is recorded. *Id.*
- On September 11, 2021, Westley was arrested for violating La.R.S 14:98.1, Operating a Vehicle While Impaired or Intoxicated, various traffic offenses and two outstanding attachments. Exh. A, ¶ 8; Exh. B, 40. On October 5, 2021, Westley was charged in the 24th Judicial District of Louisiana for violating La.R.S 14:98(A) & 14:98.1(A)(3), Operating a Vehicle While Impaired or Intoxicated. Exh. A, ¶ 8; Exh. B, 55. On November 22, 2021, an attachment was issued for failure to appear on the charges. *Id.* On April 25, 2023, Westley was convicted of these offenses and sentenced to 120 days imprisonment. *Id.*
- On February 6, 2022, Westley was arrested for violating La.R.S. 14:98(A), Operating a Vehicle While Impaired or Intoxicated, various traffic citations and an outstanding attachment. Exh. A, ¶ 9; Exh. B, 61, 70. On July 7, 2022, Westley was convicted of Driving Under the Influence of Alcohol or Narcotics and sentenced to serve six months imprisonment. Exh. A, ¶ 9; Exh. B, 71.
- On February 26, 2022, Westley was indicted at the U.S. District Court for the Eastern District of Louisiana in Case No. 22-33 for violation of 8 U.S.C. § 1326(a). Exh. A, ¶ 10. On September 1, 2023, the indictment was dismissed because the statute of limitations had expired. Exh. A, ¶ 10; Exh. B. at 82–85.
- On August 16, 2022, Westley was arrested for violation of 14:35.3, Domestic Abuse Battery. Exh. A, ¶ 11; Exh. B, 69. The charges were refused by the Orleans Parish District Attorney. *Id.*

- On July 6, 2024, Westley was arrested for various traffic violations and three outstanding attachments in Jefferson Parish, Louisiana. Exh. A, ¶ 12; Exh. B, 43–44.

On July 6, 2024, ICE placed an immigration detainer on Westley. Exh. A, ¶ 12. On July 8, 2024, Petitioner entered ICE custody and was released with an I-220(B) OSUP for medical reasons. Exh. A, ¶¶ 12, 16; Exh. B, 9–12. As a requirement of the OSUP, Petitioner was placed on an ankle monitor. Exh. A, ¶ 12. After 6 months, the purpose of the OSUP was served and it was appropriate to enforce the June 3, 2010 removal order. Exh. A ¶ 16 (citing 8 C.F.R. § 241.4(l)(2)(i), (iii)).

On February 1, 2025, Westley reported for a scheduled check-in appointment. Exh. A, ¶ 16. ICE then detained Westley and began processing Westley for removal pursuant to 8 U.S.C. § 1231(a)(5). *See also* 8 C.F.R. § 241.4(l)(2)(iii). Exh. A, ¶ 16; Exh. B, 2–6. ICE also began the process of coordinating with United States Citizenship and Immigration Services for a Reasonable Fear Interview pursuant to INA § 241(a)(5) [8 U.S.C. § 1231(a)(5)]; 8 C.F.R. § 1208.31. Exh. A, ¶ 16.

LEGAL BACKGROUND

Congress has established a streamlined process for removing aliens who have previously been removed from the United States under a final order of removal and have then reentered the country unlawfully. If the Department of Homeland Security ("DHS") "finds that an alien has reentered the United States illegally after having been removed … under an order of removal, the prior order of removal is reinstated from its original date." 8 U.S.C. § 1231(a)(5). DHS may "at any time" effectuate removal "under the prior order." *Id.* The reinstated order "is not subject to

being reopened or re-viewed," and the alien "is not eligible and may not apply for any relief" from the reinstated order of removal. *Id.*

Under the INA, the Department has the authority to grant an order of supervision for an alien subject to a final order of removal who has not been removed within the 90-day removal period. 8 U.S.C. § 1231(a)(3). The regulations explain that an alien released after the removal period "shall be released pursuant to an order of supervision." 8 C.F.R. § 241.5(a). This order of supervision comes with conditions of supervision. *Id.* The regulations also permit the government to revoke this order of supervision. 8 C.F.R. § 241.4(*l*). If an alien violates the conditions of release, he or she is notified of the reasons for revocation and afforded an information interview to respond to the reasons for revocation. 8 C.F.R. § 241.4(*l*)(1). The regulation also allows the government to terminate an order of supervision if the ICE District Director choses to in his discretion.

8 C.F.R. § 241.4(*l*)(2). The district director may:

> revoke release of an alien when, in the district director's opinion, revocation is in the public interest and circumstances do not reasonably permit referral of the case to the Executive Associate Commissioner. Release may be revoked in the exercise of discretion when, in the opinion of the revoking official:
>
> (i) The purposes of release have been served;
> (ii) The alien violates any condition of release;
> (iii) It is appropriate to enforce a removal order or to commence removal proceedings against an alien; or
> (iv) The conduct of the alien, or any other circumstance, indicates that release would no longer be appropriate.

Id.

STANDARD OF REVIEW

Preliminary injunctive relief—whether through a temporary restraining order or a preliminary injunction—is "an extraordinary and drastic remedy, one that should not be granted

unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). A preliminary injunction is "warranted only when the movant shows (1) a substantial likelihood of success on the merits, (2) irreparable injury if the injunction is not granted, (3) that the injury outweighs any harm to the other party, and (4) that granting the injunction will not disserve the public interest." *CAE Integrated, LLC v. Moov Techs., Inc.*, 44 F.4th 257, 261 (5th Cir. 2022) (internal quotations omitted). The "burden of persuasion on all of the four requirements for a preliminary injunction is at all times upon the plaintiff." *Id.* (citation omitted).

ARGUMENT

I. Petitioner Cannot Establish a Likelihood of Succes on the Merits of Any Claim.

A. 8 U.S.C. § 1252(g) Precludes Review of Petitioner's Claims

The jurisdiction of the federal courts is presumptively limited. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Sheldon v. Sill*, 49 U.S. 441, 448 (1850) ("Congress, having the power to establish the courts, must define their respective jurisdictions."). They "possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen*, 511 U.S. at 377 (internal citations omitted); *see also Sheldon*, 49 U.S. at 449 ("Courts created by statute can have no jurisdiction but such as the statute confers."). As relevant here, in 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), which included provisions intended to deprive this Court of jurisdiction over Petitioner's request for injunctive relief that would effectively stay Petitioner's removal.

Specifically, 8 U.S.C. § 1252(g) deprives the Court of jurisdiction to review claims arising from the three discrete actions identified in § 1252(g), including, as relevant here, the

decision or action to "execute removal orders." Congress spoke clearly, emphatically, and repeatedly, providing that "no court" has jurisdiction over "any cause or claim" arising from the execution of removal orders, "notwithstanding any other provision of law," whether "statutory or nonstatutory," including habeas, mandamus, or the All Writs Act. 8 U.S.C. § 1252(g). Accordingly, by its terms, this jurisdiction-stripping provision precludes habeas review under § 2241 (as well as review pursuant to the All Writs Act and Administrative Procedures Act) of claims arising from a decision or action to "execute" a final order of removal. *See Reno v. American-Arab Anti-Discrimination Committee* ("*AADC*"), 525 U.S. 471, 482 (1999).

Because a request for a stay of removal "aris[es] from the decision … by the Attorney General to ... execute removal orders," the "district court lacks jurisdiction to stay an order of removal." *Hidalgo-Mejia v. Pitts*, 343 F. Supp. 3d 667, 673 (W.D. Tex. 2018) (citing *Idokogi v. Ashcroft*, 66 F. App'x 526 (5th Cir. 2003) (per curiam) (finding that petitioner's request for a stay of deportation was connected "directly and immediately with the Attorney General's decision to commence removal proceedings against him" and "[t]he district court therefore correctly determined that it lacked jurisdiction to stay the order of removal."); *Fabuluje v. Immigration & Naturalization Agency*, 244 F.3d 133 (5th Cir. 2000) (per curiam) ("[T]he district court correctly determined that it was without jurisdiction to consider Fabuluje's request for a stay of the removal proceedings."); *see also* 8 U.S.C. § 1252(g)). Indeed, every circuit court of appeals to address this issue had held that § 1252(g) eliminates subject matter jurisdiction over habeas challenges, including constitutional claims, to an arrest or detention for the purpose of executing a final removal order. *See Rauda v. Jennings*, 55 F.4th 773, 778 (9th Cir. 2022) (holding that it lacked jurisdiction over noncitizen's habeas challenge to the exercise of discretion to execute his removal order); *Camarena v. Dir., ICE*, 988 F.3d 1268, 1274 (11th Cir.

2021) ("[W]e do not have jurisdiction to consider 'any' cause or claim brought by an alien arising from the government's decision to execute a removal order. If we held otherwise, any petitioner could frame his or her claim as an attack on the government's authority to execute a removal order rather than its execution of a removal order."); *Tazu v. Att'y Gen. U.S.*, 975 F.3d 292, 297 (3d Cir. 2020) (observing that "the discretion to decide *whether* to execute a removal order includes the discretion to decide *when* to do it" and that "[b]oth are covered by the statute") (emphasis in original); *Silva v. United States*, 866 F.3d 938, 941 (8th Cir. 2017) (Section 1252(g) applies to constitutional claims arising from the execution of a final order of removal, and language barring "any cause or claim" made it "unnecessary for Congress to enumerate every possible cause or claim"); *Elgharib v. Napolitano*, 600 F.3d 597, 602 (6th Cir. 2010) ("[A] natural reading of 'any other provision of law (statutory or nonstatutory)' includes the U.S. Constitution." (quoting 8 U.S.C. § 1252(g)); *see also Hamama v. Adducci*, 912 F.3d 869, 874–77 (6th Cir. 2018) (vacating district court's injunction staying removal, concluding that § 1252(g) stripped district court of jurisdiction over removal-based claims and remanding with instructions to dismiss those claims). While the Fifth Circuit has not spoken to § 1252(g)'s reach recently, the Court has previously recognized that jurisdiction-stripping nature of § 1252(g), *Idokogi*, 66 F. App'x 526, as well as that § 1252(g) prevents noncitizens from challenging non-discretionary decisions that are related to the discretionary decision to execute a removal order. *Foster v. Townsley*, 243 F.3d 210, 213-14 (5th Cir. 2001). Moreover, the statute covers claims of excessive force, denial of due process, denial of equal protection, and retaliation all "arise from" the execution of removal order. *Id.*

In the habeas petition, Petitioner seeks to have this Court "temporarily stay [her] removal" or and prevent any "transfer outside the jurisdiction of this Court and the United

States" pending the adjudication of Petitioner's T visa application. Habeas Pet., Prayer for Relief. Petitioner further requests that the Court declare that any deportation of Petitioner before the adjudication of the T visa application is unlawful. *Id.* These claims for relief, however, are exactly what § 1252(g) precludes. Petitioner is subject to a reinstated removal order. Exh. B, 2, 25, 32. The government now intends to execute this order and the Court lacks jurisdiction to intervene. *See E.F.L. v. Prim*, 986 F.3d 959, 965 (7th Cir. 2021) ("Section 1252(g) precludes judicial review of 'any' challenge to 'the decision or action by [DHS] to … execute removal orders.' That includes challenges to DHS's 'legal authority' to do so. Otherwise, § 1252(g) would be a paper tiger; any petitioner challenging the execution of a removal order could characterize his or her claim as an attack on DHS's 'legal authority' to execute the order and thereby avoid § 1252(g)'s bar."). Thus, Petitioner cannot show a likelihood of success on the merits of Petitioner's claims seeking a stay of removal.

Likewise, Petitioner's argument that the government has unlawfully detained Petitioner is precluded by 8 U.S.C. § 1252(g). Westley incorrectly argues that re-detention violates Petitioner's due process rights. TRO Mot. at 6, Habeas Pet. at ¶¶ 55-59 (Count I). Even if Petitioner were able to show that ICE violated the regulations, the INA precludes claims that "arise from" the decision to execute a removal order. *Foster*, 243 F.3d at 213. In this case, the revocation of the OSUP and detention of Petitioner were secondary to ICE's plans to execute the final removal order. Exh. A. ¶ 16. As indicated in Assistant Field Office Director David Raynes's declaration, removal is significantly likely due to Honduras's cooperation with the United States to allow repatriation quickly. *Id.* at ¶ 17. Thus, Petitioner's claims regarding detention incident to removal are also likely to fail where this Court lacks jurisdiction to review them. *Foster*, 243 F.3d at 214–15 (holding that the claim regarding the denial of due process,

among others, was "directly connected to the execution of the deportation order" and fell "within the ambit of section 1252(g)" which precluded judicial review).

Section 1252(g) also removes this Court's jurisdiction to review Petitioner's Fourth Amendment claim because it too is "inextricably linked" to Petitioner's order of removal. *Id.* (citing *Humphries v. Various Federal USINS Employees*, 164 F.3d 936, 942 (5th Cir. 1999) ("holding that the court had no jurisdiction under § 1252(g) to review the plaintiff's claim that INS agents conspired to exclude him in retaliation for exercising his First Amendment rights" … because the claims were "directly connected to the execution of the deportation order. Therefore, their acts fall within the ambit of section 1252(g) and are precluded from judicial review.")).

Petitioner incorrectly asserts that Petitioner is "likely to succeed on her claim that the government's actions, taking her into custody without any notice or warning, violated her rights under the Fourth Amendment" because "there were no exigent circumstances or any circumstances to justify the use of a 'ruse,'" i.e.., the text message Petitioner received from the ICE Intensive Supervision Program ("ISAP") scheduling an appointment in connection to the OSUP. *See* TRO Mot. at 12; *see also* Habeas Pet. Petitioner further claims that this "ruse" was "used by the government to arrest her without any notice or warning." *See* TRO Mot., 12. However, Petitioner's claim lacks merit because securing an alien while awaiting a removal determination constitutes an action to execute a removal order. *See Gupta v. McGahey*, 709 F.3d 1062, 1065 (11th Cir. 2013) ("We conclude that Gupta's claim [alleging that three U.S. ICE agents violated his Fourth and Fifth Amendment rights when they arrested and detained him in connection with the initiation of removal proceedings against him] arise from the actions taken to commence removal proceedings against him within the meaning of § 1252(g). We therefore do not reach the question of whether to recognize a *Bivens* action under these circumstances.");

Kareva v. United States, 9 F. Supp. 3d 838, 844-45 (S.D. Ohio 2014) (holding that "Section 1252(g) does apply in this case because Plaintiff's claim for false arrest and imprisonment arises from "the decision or action by the Attorney General to … execute removal orders.").

A fellow district court's decision in *Lopez v. Prendes* elucidates how Petitioner's Fourth Amendment claim fails. No. 3-11-CV-3184-M-BD, 2012 WL 3024209, at *1–2 (N.D. Tex. June 27, 2012), *report and recommendation adopted*, No. 3-11-CV-3184-M, 2012 WL 3024750 (N.D. Tex. July 24, 2012). In *Lopez*, Ms. Betty Lopez, a citizen and national of Mexico, re-entered the United States after previously being removed on an expedited basis. *Lopez*, 2012 WL 3024209, at *1. ICE agents allegedly perpetrated a "ruse," misleading Ms. Lopez and her husband into permitting them into their home for the purpose of taking her into custody and reinstating her prior removal order. *Id.* ICE removed Ms. Lopez to Mexico the following day. *Id.* Plaintiffs sued, seeking declaratory and injunctive relief arising from alleged violations of their, *inter alia*, Fourth Amendment rights when Ms. Lopez was taken into custody. *Id.* The court dismissed those claims for lack of jurisdiction under 8 U.S.C. § 1252(g) noting that "it is clear that plaintiffs' claims arise out of the execution of a removal order against Betty Lopez through her arrest and subsequent deportation to Mexico. The actions of ICE agents in gaining entry into the Lopez home and reinstating Betty's prior removal order are directly and immediately connected with the 'initiation or prosecution of various stages in the deportation process.'" *Id.*, at *2 (internal quotations omitted); *see also Foster*, 243 F.3d at 214 (finding that claims of excessive force, denial of due process, denial of equal protection and retaliation were "directly connected to the execution of the deportation order"); *Khorrami v. Rolince*, 493 F. Supp. 2d 1061, 1068 (N.D. Ill. 2007) (claim that federal agents violated Fourth Amendment during execution of removal order "was a direct outgrowth of the decision to commence proceedings"). Thus,

Petitioner's Fourth Amendment claim challenging the "ruse" used by ICE to lure and detain Petitioner in the execution of a removal order are foreclosed by § 1252(g) because the claim arises from the decision to execute a removal order and falls outside this Court's jurisdiction pursuant to 8 U.S.C. § 1252(g). Accordingly, Petitioner is not likely to succeed on the Fourth Amendment claim either.

Finally, Petitioner cannot regain this Court's jurisdiction through citation to the Administrative Procedure Act (APA) as that statute does not provide jurisdiction to review the decision to detain Petitioner prior to removal to Honduras. *See* TRO Mot. at 8; Habeas Pet. at ¶¶ 63-69 (Count III). Section 701(a) of the APA explicitly states, "This chapter applies, according to the provisions thereof, except to the extent that— (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). Not only does § 1252(g) preclude judicial review, but also the government's decision to execute the removal order is discretionary. *American–Arab*, 119 S. Ct. at 943; *E.F.L*, 986 F.3d at 965. Once again, Petitioner cannot show a likelihood of a success on the merits.

B. Petitioner Cannot Seek a Stay via a Writ of Habeas Corpus

The relief sought by Petitioner—a stay of removal so as to remain in the United States while an application is pending—is relief that is unavailable in habeas. This is not a challenge to the legality of Petitioner's detention. "Habeas is at its core a remedy for unlawful executive detention." *Munaf v. Geren*, 553 U.S. 674, 693 (2008). The writ of habeas corpus and its protections are "strongest" when reviewing "the legality of Executive detention." *INS v. St. Cyr*, 533 U.S. 289, 301 (2001). Therefore, the traditional function of the writ is to seek one's release from unlawful detention. *Department of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959, 1969 (2020) (citing *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973)). As the Supreme Court has

held, relief other than "simple release" is not available in a habeas action. *See Thuraissigiam*, 140 S. Ct. at 1970–71 ("Claims so far outside the core of habeas may not be pursued through habeas.") (internal quotations and citations omitted).

But instead of simple release, Petitioner seeks a full stop to removal. *See generally* TRO Mot., Habeas Pet. This is not the type of relief that the Supreme Court found to be subject to habeas review. *See Thuraissigiam*, 140 S. Ct. at 1970 (holding that the relief sought, which did not include release, fell "outside the scope of the common-law habeas writ"). In reversing the Ninth Circuit's decision, the Supreme Court concluded that habeas has been historically used to challenge confinement and detention. *Id.* at 1969–70. In *Thuraissigiam*, the petitioner did not seek "simple release," and if he had sought proper habeas relief, it would take the form of release "in the cabin of a plane bound for [the designated country]." *Id.* at 1970. Other circuits have followed this principle. *See, e.g.*, *Tazu*, 975 F.3d at 300 ("And Tazu's constitutional right to habeas likely guarantees him no more than the relief he hopes to avoid—release into 'the cabin of a plane bound for Bangladesh.'") (brackets omitted); *E.F.L.*, 986 F.3d at 965-66 (holding that a petitioner could not invoke an alleged Suspension violation when a petition does not contest the lawfulness of restraint or seek release from custody); *Rauda*, 55 F.4th at 780 (same as *E.F.L.*).

Though Petitioner claims to seek release from detention, in reality Petitioner seeks to remain in the United States to pursue other immigration benefits. The Supreme Court has taken a "narrow view of habeas relief in the immigration context, which supports [a] reluctance to extend habeas relief to aliens who are released from detention." *See Bacilio-Sabastian v. Barr*, 980 F.3d 480, 483 (5th Cir. 2020) (citing *Thuraissigiam*, 140 S. Ct. at 1963). Because this Court

should reject Petitioner's request to expand it further, Petitioner's habeas claim is not likely to succeed on the merits.

C. The Government Lawfully Re-Detained Petitioner

Should this Court determine that it retains jurisdiction over Petitioner's habeas claim, Westley still cannot establish a likelihood of success on the merits. Petitioner is subject to a reinstated order of removal. Exh. A, at ¶ 4; Exh. B, at 2, 25, 32. Pursuant to 8 U.S.C. § 1231(a)(5), Petitioner's "prior order of removal is reinstated from its original date . . . and [Petitioner] shall be removed under the prior order at any time after the reentry." Because Petitioner's prior order of removal was final on June 3, 2010, Petitioner is now outside of the 90-day removal period during which the government "shall detain" the individual. 8 U.S.C. § 1231(a)(2). Petitioner was permitted to remain in the United States under an OSUP, as authorized by 8 U.S.C. § 1231(a)(3). However, 8 U.S.C. § 1231(a)(6) allows the government to detain an alien ordered removed beyond the removal period if the individual is inadmissible under § 1182, removable under § 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4), or has been determined to be a risk to the community or unlikely to comply with the order of removal. This statute provided ICE with the authority to detain Petitioner on February 1, 2025. Further, under *Zadvydas v. Davis*, 533 U.S. 678 (2001), Petitioner may be held in confinement until it has been determined that there is "no significant likelihood of removal in the reasonably foreseeable future." *Id.* at 701.

In arguing that ICE has violated the applicable regulations, Petitioner miscites which regulation is at issue. The regulatory procedures for detaining an individual past the removal period are found in 8 C.F.R. § 241.4. This regulation "specifies a process for detaining people beyond the removal period and for releasing them thereafter. 8 C.F.R. § 241.4(d)–(k). It also

specifies a process for returning a person, once released, back to detention. 8 C.F.R. § 241.4(l)."

Alam v. Nielsen, 312 F. Supp. 3d 574, 582 (S.D. Tex. 2018). The government is permitted to revoke the release of an individual under an OSUP in its discretion. Section 241.4(*l*) explains that:

> A district director may [] revoke release of an alien when, in the district director's opinion, revocation is in the public interest and circumstances do not reasonably permit referral of the case to the Executive Associate Commissioner. Release may be revoked in the exercise of discretion when, in the opinion of the revoking official:
>
> (i) The purposes of release have been served;
> (ii) The alien violates any condition of release;
> (iii) It is appropriate to enforce a removal order or to commence removal proceedings against an alien; or
> (iv) The conduct of the alien, or any other circumstance, indicates that release would no longer be appropriate.

8 C.F.R. § 241.4(*l*).

In reviewing a similar case, a district court judge in Texas described 8 C.F.R. § 241.4 as a regulation that "prescribes in considerable detail a set of custody reviews, release procedures, and other processes, but through that forest has been cut that short and straight path for immigrants whom the government is ready and able to remove." *Alam*, 312 F. Supp. 3d at 582. That court noted that ICE officials have discretion to revoke a person's release when "[i]t is appropriate to enforce a removal order." *Id.* (citing 8 C.F.R. § 241.4(l)(2)(iii)). In turn, "the possibility of 'prompt removal' suspends the custody reviews that the regulation otherwise requires." *Id.* (citing 8 C.F.R. § 241.4(k)(3)). Because ICE intends to remove Petitioner to Honduras, Petitioner cannot establish a likelihood of success on the argument that the decision to revoke the OSUP violated any due process rights.

Petitioner is mistaken that 8 C.F.R. § 241.13(i) applies in this case, where ICE intended to remove Petitioner to Honduras promptly. *See* TRO Mot. at 7. The scope of 8 C.F.R. § 241.13

is explicitly established to cover "special review procedures for those aliens who are subject to a final order of removal and are detained under the custody review procedures provided at § 241.4 after the expiration of the removal period, where the alien has provided good reason to believe there is no significant likelihood of removal to the country to which he or she was ordered removed, or to a third country, in the reasonably foreseeable future." 8 C.F.R. § 241.13(a); *see also*, *Zadvydas*, 533 U.S. at 701 (Petitioner bears initial burden to show that there is "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future."). "Removal is not reasonably foreseeable in cases where no country would accept the detainee, the country of origin refused to issue the proper travel documents, the United States and the country of origin did not have a removal agreement in place, or the country to which the deportee was going to be removed was unresponsive for a significant period of time." *Alam*, 312 F. Supp. 3d at 581 (internal quotations and citations omitted). This is simply not the case here.

In fact, Petitioner has not provided any impediment to removal to Honduras and Petitioner has been removed to that country two times previously. Exh. A, ¶¶ 2, 4; Exh. B, 25, 29. Moreover, as explained by Assistant Field Office Director Raynes, ICE intended to remove Petitioner as soon as possible. Exh. A, ¶ 16–17; Exh. B, 2. Honduras participates in the Electronic Nationality Verification (ENV) program, which allows for the expeditious return of participating countries' nationals by verifying nationality electronically, which means that ICE provides biographical information electronically to Honduras and that country verifies and approves repatriation quickly. Exh. A, ¶ 17. ICE has followed its regulatory procedures and Petitioner's removal is significantly likely in the reasonably foreseeable future. *Id.* Petitioner has no basis to challenge ICE's detention authority, so Petitioner cannot establish a likelihood of success on the merits.

D. Petitioner's Assertion That Removal Prior to the Adjudication of the T Visa Application Violates Procedural Due Process, Statute, and Regulations Is Unlikely to Succeed.

Petitioner asks this Court to order Petitioner's release from detention, effectively staying removal pursuant to a lawful, valid removal order. Habeas Pet., Prayer for Relief. Petitioner asserts that a pending T visa application entitles Petitioner to due process. TRO Mot., 3. However, the Due Process Clause does not protect a "benefit … if government officials may grant or deny it in their discretion." *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756 (2005); *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 462-63 (1989); *see also Olim v. Wakinekona*, 461 U.S. 238, 249 (1983). Other Circuit courts have held that "[a]n alien has no constitutionally-protected right to discretionary relief or to be eligible for discretionary relief." *Yuen Jin v. Mukasey*, 538 F.3d 143, 157 (2d Cir. 2008) (quoting *Oguejiofor v. Attorney General of U.S.*, 277 F.3d 1305, 1309 (11th Cir. 2002) (emphasis omitted)); *see Smith v. Ashcroft*, 295 F.3d 425, 430 (4th Cir. 2002) (addressing former statutory immigration scheme).

Petitioner purportedly filed a T visa on or about January 10, 2025, and it remains pending without an initial determination of whether Petitioner's claim is bona fide. Habeas Pet., Exh. 2, Declaration of Sarah Gillman, ¶ 3. Accordingly, Petitioner has no right to a stay of removal, as the mere submission of an application seeking T visa classification has no effect on ICE's authority or discretion to execute a final order of removal. 8 C.F.R. § 214.204(b)(2)(i) ("The filing of an Application for T Nonimmigrant Status has no effect on DHS authority or discretion to execute a final order of removal….")

Petitioner relies on two cases in support of the assertion that the filing of a T visa application triggers protected liberty interests: *Fatty v. Nielsen*, No. C17-1535-MJP, 2018 WL 3491278 (W.D. Wash. July 20, 2018) and *S.N.C. v. Sessions*, No. 18 CIV. 7680 (LGS), 2018 WL

6175902, (S.D.N.Y. Nov. 26, 2018). Habeas Pet. ¶ 51, TRO Mot. at 12. Though these cases present similar circumstances to Petitioner's, the government respectfully disagrees with their analysis. To begin with, *Fatty* relies heavily on pre-REAL ID Act law. *See* 2018 WL 3491278, at *1 (citing *Barahona-Gomez v. Reno*, 236 F.3d 1115, 1118 (9th Cir. 2001) for the proposition that district courts have jurisdiction under section § 1252(g) for due process claims). However, courts have distinguished *Barahona-Gomez* and found that claims such as Petitioner's are indeed barred by section 1252(g). *See e.g., Balogun v. Sessions*, 330 F. Supp. 3d 1211, 1216–17 (C.D. Cal. 2018) (distinguishing *Barahona-Gomez* and noting that "[i]f Plaintiff wins, ICE must stay removal; if Plaintiff loses, ICE will almost certainly carry it out. Either way, entertaining Plaintiff's claim would require judicial second guessing of ICE's discretionary decision of whether and when to execute removal— the very outcome that section 1252(g) precludes."). *Fatty* is also flawed because it draws on "liberty interests" discussed in *Zadvydas, 533* U.S. at 693–94 (right to possible release after removal becomes no longer reasonably foreseeable), and *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (right to be free from imprisonment at hard labor). These "liberty interests" are very different from a supposed right to a stay of removal while an application for discretionary relief remains pending. And in determining that the petitioner "face[d] a risk of erroneous deportation," the *Fatty* court relied on four district court cases presenting specific circumstances that gave rise to a statutory right to move to reopen removal proceedings and an entitlement under 8 U.S.C. § 1231(b)(3)(A) not to be deported to a country where persecution would occur. *See Fatty*, 2018 WL 3491278, at *3. Unlike the district court cases cited in *Fatty* (and like the *Fatty* decision itself), Petitioner does not have such a claim here.

The decision in *S.N.C. v. Sessions*, No. 18 CIV. 7680 (LGS), 2018 WL 6175902 (S.D.N.Y. Nov. 26, 2018), is likewise flawed as it relies heavily on *Fatty* for the proposition that 8 U.S.C. § 1252(g) does not strip the court of jurisdiction to hear the claim. But as discussed above, Petitioner's claim cannot be decided independent of—and thus is not collateral to—ICE's choice to execute removal. *See Velarde-Flores v. Whitaker*, 750 F. App'x 606, 607 (9th Cir. 2019); *Balogun v. Sessions*, 330 F. Supp. 3d 1211, 1218 (C.D. Cal. 2018); *Rodriguez-Sosa v. Whitaker*, No. CV 18-3261 (PAM/KMM), 2018 WL 6727068, at *2 (D. Minn. Dec. 21, 2018); *Mingrone v. Adducci*, No. 2:17-CV-11685, 2017 WL 4909591, at *6 (E.D. Mich. July 5, 2017). The District of Minnesota's decision in *Nicholas L. L. v. Barr*, is particularly instructive. No. 19-CV-02543-ECTTNL, 2019 WL 4929795, at *1 (D. Minn. Oct. 7, 2019). As in this case, the petitioner in *Nicholas L. L.* sought a stay of removal during the pendency of his T visa application based on the *Fatty* and *S.N.C.* decisions. The court in *Nicholas L. L.* rejected the reasoning of *Fatty* and *S.N.C.* for several reasons, including for the failure of those courts to address the regulatory language that clearly stated that ICE was not prevented from removing an alien during the pendency of a T visa application. *See id.* at *7 (noting that "*Fatty* recognized, citing 8 C.F.R. § 214.11(d)(1)(ii), that the petitioner '[did] not have a protected property interest in his T visa or its adjudication'" but that "neither the regulation nor the procedures it establishes are addressed in Fatty's due process assessment" and that the decision "does not explain why, for example, the request for an administrative stay of removal under 8 C.F.R. § 241.6(a), made available in 8 C.F.R. § 214.11(d)(1)(ii), is insufficient. Nor is the availability of other procedures, such as a reasonable-fear determination under 8 C.F.R. § 208.31, addressed.").

Here, though the operative regulations have since changed, the takeaways remain the same: filing an application seeking T nonimmigrant status has no effect on ICE's authority or

discretion to execute a final order of removal and Petitioner retains the ability to request an administrative stay of removal under 8 C.F.R. § 241.6(a). 8 C.F.R. § 214.240(b)(2)(i). The statute lends further credence to Defendants' position, as 8 U.S.C. § 1227(d)(1) provides that if a T visa application sets forth a prima facie case for approval, a *discretionary* stay *may* be granted by ICE, indicating that Congress specifically considered this scenario and did not want the submission of a T visa application alone to be a wholesale bar to removal.

Petitioner argues that removal would be unlawful because it would be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" in violation of § 706(2) of the APA. Not only is the APA inapplicable, but even if it were, the regulations for T nonimmigrant status place the burden on the applicant to demonstrate eligibility for relief, *see* 8 C.F.R. § 214.204(b), and a stay of removal is granted automatically only once the application is preliminarily determined by USCIS to be "bona fide," *id.* § 214.204(b)(2)(iii). The regulations are clear that, prior to that preliminary determination, "[T]he filing of an application for T nonimmigrant status has no effect on DHS authority or discretion to execute a final order of removal, although the alien may request an administrative stay of removal pursuant to 8 CFR 241.6(a)." *Id.* § 214.204(b)(2)(i). Petitioner's proposal that the mere filing of an application would operate as a stay of removal runs squarely opposite to these regulations.

II. Petitioner Will Not Suffer Irreparable Harm

Petitioner argues that removal would render Petitioner ineligible for the T visa. But the relief available in habeas is release from confinement, not a full stop to removal to pursue other immigration relief. *See supra* Part I.B. Petitioner would not be irreparably injured by denying a stay when these habeas proceedings cannot provide the relief Petitioner seeks.

Petitioner also claims that they will suffer irreparable harm because removal to Honduras will "vitiate her right to pursue T Visa nonimmigrant status." TRO Mot. at 13. But Petitioner has had a removal order since 2010 and has been removed to Honduras twice. Moreover, Petitioner was placed on an OSUP, which Petitioner signed, in July 2024 for medical reasons. Exh. A, ¶ 16. This order came with the condition of checking in with ICE periodically. Exh. B, at 9 ("Because the agency has not effected your deportation or removal during the period prescribed by law, it is order that you be placed under supervision and permitted to be at large under the following conditions: That you appear in person at the time and place specified, upon each and every request of the agency, for identification and for deportation or removal."). Despite all of these factors, Petitioner did not file an application for a T visa until on or about January 10, 2025. Habeas Pet., Exh. 2, Declaration of Sarah Gillman, ¶ 3. Petitioner has not explained why Petitioner did not file an application for a T visa earlier, even while alleging that to be a survivor of human trafficking as a minor and as an adult. TRO Mot. at 13. ICE's actions here are nothing more than an attempt to enforce the final removal order in accordance with the law. *See AADC*, 525 U.S. at 490 (presence of removable foreign national is a "continuing violation of United States law"). Petitioner does not establish a cognizable harm in the motion for preliminary relief.

III. Balance of Equities and the Public Interest Favor the Government

Finally, the balance of equities and the public interest also weigh decisively against Petitioner's request for preliminary relief. Petitioner has an extensive criminal history, including convictions for simple burglary of an inhabited dwelling, possession of stolen things, operating a vehicle while impaired or intoxicated, bank fraud, theft, and forgery spanning many years. Exh. A, ¶¶ 3-12. Petitioner also has a final order of removal—twice executed and twice disregarded

with repeated unlawful reentry. Yet, Petitioner would have this Court enjoin the enforcement of an unquestionably lawful and final removal order. Petitioner's request for a stay would result in the extension of "ongoing violation[s] of United States law" through delay and fragmentation of the enforcement of the immigration laws. *AADC*, 525 U.S. at 491. Congress, however, specifically amended the INA, including through 8 U.S.C. § 1252(g), with precisely such delay and fragmentation in mind. *See AADC*, 525 U.S. at 487 ("[8 U.S.C. § 1252(g)] is specifically directed at the deconstruction, fragmentation, and hence prolongation of removal proceedings."). The public has a strong interest in enforcement of these laws, and "[t]he contention that a violation must be allowed to continue because it has been improperly selected is not powerfully appealing." *Id.* As the Supreme Court observed in *Nken*, "[t]here is always a public interest in prompt execution of removal orders[.]" *Nken v. Holder*, 556 U.S. 418, 436 (2009) (internal quotation omitted). And "that interest may be heightened" by the circumstances of a particular case. *Nken*, 556 U.S. at 436. Here, the public interest generally favors the removal of an individual who has demonstrated repeated disregard for both the immigration and criminal law.

CONCLUSION

For the foregoing reasons, the Court should deny Petitioner any form of preliminary injunctive relief.

Dated this 6th day of February 2025.

Respectfully submitted,

BRETT SHUMATE
Acting Assistant Attorney General
Civil Division

ELIANIS PEREZ
Assistant Director

SARAH L. VUONG
Assistant Director

LINDSAY ZIMLIKI
Trial Attorney

/s/ Amanda B. Saylor
AMANDA B. SAYLOR
Trial Attorney
U.S. Department of Justice
Civil Division
Office of Immigration Litigation
General Litigation & Appeals Section
Ben Franklin Station
P.O. Box 868
Washington, D.C. 20044
Telephone: (202) 598-6837
Amanda.B.Saylor@usdoj.gov

Attorneys for Defendants