UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Arely Westley,[1] *Petitioner,* v. **Mellissa B. Harper, et. al.,** *Respondents.*	Case No. 2:25-cv-00229 Section M (4) Judge Barry W. Ashe Magistrate Judge Karen Wells Roby

PETITIONER'S REPLY

PRELIMINARY STATEMENT

There is no question that the United States Constitution binds U.S. Immigration and Customs Enforcement ("ICE"). *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1044-45 (1984). In fact, ICE policy mandates that the Constitution, and specifically the Fourth Amendment, be followed in making ICE arrests. *Id.* But ICE did not follow the Constitution here, let alone its own regulations. Instead, on February 1, 2025, ICE unlawfully arrested Petitioner ("Arely"), a trafficking victim with a pending T-Visa application.

Arely thus filed a habeas petition challenging her seizure, the *de facto* revocation of her Order of Supervision ("OSUP"), and interference with her pending T-Visa application. *See* ECF No. 1. Arely seeks (1) "simple release" from her February 1 detention, *Dept. of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 120 (2020); and (2) a declaration that ICE violated her constitutional and statutory rights that day, *see Lopez-Mendoza*, 468 U.S. at 1045 (declaratory relief against ICE for unconstitutional conduct appropriate when standing exists). There is no merit to ICE's contention that Arely is not challenging the legality of her detention that resulted from that arrest. She absolutely is. That she was physically released pursuant to this Court's order, ECF No. 7, is of no moment as to her ability to seek habeas relief. Indeed, but for ICE's inability to humanely detain her within the jurisdiction, she would still be detained. *See* ECF No. 20 at 2.

In the case at bar, ICE neither followed the Constitution in arresting Arely, nor its own regulations in revoking her OSUP.[1] Arely's arrest and OSUP revocation are accordingly void. Release from the unconstitutional detention is appropriate and Arely should be provided with a

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[1] OSUPs place individuals under supervision rather than in immigration detention after determining that those individuals are not flight risks or dangers to the community. 8. C.F.R. § 241.4. When individuals under OSUPs are thereafter detained, any question of detention necessarily involves analyzing whether the OSUP was properly revoked. *See Rombot v. Souza*, 296 F. Supp. 3d 383, 387 (D. Mass. 2017).

declaration that her constitutional, statutory, and regulatory rights were violated on February 1, when ICE seized her pursuant to an unconstitutional ruse.

It is true that 8 U.S.C. § 1252(g) ("1252(g)") limits some forms of judicial review, but not here, where Arely's claim challenging her unlawful detention does not "arise from" a decision to "execute a removal order." *Reno v. American-Arab Anti-Discrimination Comm.*, 525 US 471, 482 (1999) ("*AADC*"). Tellingly, ICE does not argue that no constitutional violation occurred here. It argues only that this Court has no power to correct it. Moreover, 1252(g) case law recognizes that, in situations like this one, the judiciary has a critical role to play in holding agencies accountable to the Constitution. Section 1252(g) does not defang the Constitution and render it hollow.

Accordingly, this Court has jurisdiction to adjudicate the very narrow claims at issue here—specifically, the constitutionality of Arely's arrest and the revocation of her OSUP. It may issue a declaration that ICE is required to effectuate any arrest of Arely in accordance with the Constitution and its own OSUP revocation regulations. Doing so would not remotely interfere with Arely's removal or any process she is due before it. Rather, it would simply require ICE to adhere to the law. Plainly put, ICE is not above the law.

FACTS

ICE granted Arely an OSUP on July 8, 2024. Resp. Decl. at ¶ 12; Pet. Decl. ¶ 9. In making that determination, ICE considered whether Arely was a danger to the community and a flight risk. 8 C.F.R. § 241.4, *supra* note 1. It decided she was not, well aware of the criminal history catalogued in Assistant Field Office Director Raynes' declaration—the vast majority of which occurred when Arely was a sex and labor trafficking victim. Resp. Decl. at ¶ 3-11; Pet. Decl. ¶ 3. Arely always complied with her OSUP conditions, and nothing in the record supports

Respondents' bald assertion that any change in Arely's medical situation occurred between the date of her OSUP grant and her February 1 arrest. Resp. Decl. at ¶ 16; Pet. Decl. ¶ 9.

On January 24, 2025, Arely received a call from an Intensive Appearance Supervising Program ("ISAP") officer, an ICE contractor, who conducted all of Arely's OSUP check-ins. Pet. Decl. ¶ 15, Resp. Decl. ¶ 13. The officer stated that she was going to send (and in fact did send) Arely a text message about a February 1 check-in that would put Arely into a less restrictive supervision program. Pet. Decl. at ¶ 15-16.

On February 1, in reliance on the ISAP officer's text message, Arely left her home without making arrangements to feed and exercise her 10 dogs, fully expecting to return later that afternoon. *Id.* at ¶ 25. Instead, as instructed, she appeared at the ICE office located at 125 James Dr. West, St Rose, LA 70087, awaiting transfer to "Msite," the lower supervision program the text message had referenced. *Id.* at ¶ 17.

When Arely's name was called at the St. Rose office, she was taken to a conference room. *Id.* at ¶ 19. There, she was arrested, patted down and put in chains. *Id.* at ¶ 19-20. When Arely asked if she could speak to her attorney, explaining that she was in the process of seeking T-Visa relief because she is a trafficking victim, her request was denied. *Id.* at ¶. She was told that she would be transported to Hancock, Mississippi (not the Alexandria deportation staging facility), and then, after that, to a detention facility in Colorado. *Id.* at 22.

ARGUMENT

This Court has jurisdiction to review Arely's claims, which properly sound in habeas. Arely's asserts Fourth Amendment, Administrative Procedure Act ("APA"), and T-Visa due process claims. A preliminary injunction ("PI") is appropriate as Arely meets all four prongs of the applicable legal test.

First, she has a substantial likelihood of success on the merits of her claims. *See infra* at Part II. Second, she has shown irreparable injury by virtue of the constitutional violation at issue, which infects her OSUP revocation and T-Visa claims. *See Balza v. Barr*, 2020 WL 6143643, at *6 (W.D. La. Sept. 17, 2020), *R&R adopted*, 2020 WL 6064881 (W.D. La. Oct. 14, 2020). Third, no harm to ICE will ensue as it is not prevented from re-arresting Arely constitutionally. Finally, her freedom is not a disservice to the public as it simply preserves the status quo existing before her arrest by putting her back on her OSUP. Moreover, there is also always a public interest in preserving constitutional rights. *See Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 n.9 (5th Cir. 2014).

I. This Court Has Jurisdiction Over the Claims in Arely's Habeas Petition.

Section 1252(g) deprives district courts of jurisdiction for claims "arising from" *only* "three discrete actions that the Attorney General may take: her 'decision or action' to 'commence proceedings, adjudicate cases, or execute removal orders.'" *AADC*, 525 U.S. at 482; *see also Dep't of Homeland Sec. v. Regents of Univ. of Calif.*, 591 U.S. 1, 19 (2020) (calling 1252(g) "narrow," imposing no "general jurisdictional limitation" nor covering "all claims arising from deportation proceedings"). Because Arely's claims do not concern a decision to "execute a removal order" nor "arise from" a decision or action to do so, this Court has jurisdiction. Even if this Court finds 1252(g) applies, it may still adjudicate her petition under Article III or the Suspension Clause.

First, Respondents concede they detained Arely not to execute a removal order, but for proceedings to reinstate one "pursuant to INA § 241(a)(5)."[2] Resp. Decl., ¶ 16; Opp. at 10-11

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[2] *See* 8 U.S.C. § 1231(a)(5) (titled "Reinstatement of removal orders against aliens illegally reentering"). In reinstatement proceedings, a DHS officer conducts an interrogation to determine whether an individual has a prior removal order, is in fact the person identified in the prior order, and unlawfully reentered. 8 C.F.R. § 241.8(a). If, during these proceedings, a non-citizen "expresses a fear of returning to the country designated in that order, the [noncitizen] shall be immediately referred to an asylum officer for an interview to determine whether the [noncitizen] has a reasonable fear of persecution or torture pursuant to § 208.31 of this chapter." 8 C.F.R. § 241.8(e).

(conceding no decision to execute removal made; rather Arely is "awaiting a removal decision" and government only "intends to execute" when it has authority to do so). Under reinstatement proceedings, at some unspecified date in the future, Respondents intend to give Arely a Reasonable Fear Interview ("RFI").[3] *See* Opp. at 5.

Courts treat detention and the "execution" of a removal order as distinct action points. *See, e.g., Michalski v. Decker*, 279 F. Supp. 3d 487, 495 (S.D.N.Y. 2018) (finding none of 1252(g)'s "discrete actions are implicated by [petitioner's] challenge to his detention"). But Respondents incongruously argue that detention pending Arely's RFI determination "constitutes an action to execute a removal order," even though they are barred from executing her removal by virtue of the RFI process. Opp. at 11. In fact, the very cases Respondents cite consistently hold that a "decision or action to execute" under 1252(g) only occurs after the administrative process for pursuing immigration relief is exhausted and the government has chosen a removal date, scheduled a flight, or is detaining someone in brief "door-to-flight" detention. *See, e.g., Camarena v. Dir., Immigr. & Customs Enf't*, 988 F.3d 1268, 1272 (11th Cir. 2021) (finding action to execute removal occurs when departure date certain); *Tazu v. Att'y Gen. United States*, 975 F.3d 292, 297 (3d Cir. 2020) ("the act of deciding" means "the act of settling or terminating," and "to settle or terminate" a removal order, "the Attorney General must choose a date for that removal"); *Hamama v. Adducci*, 912 F.3d 869, 874 (6th Cir. 2018) (decision to execute made when flight scheduled); *Lopez v.*

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[3] If an asylum officer finds a reasonable fear exists, a non-citizen must be referred to an Immigration Judge for full consideration of a withholding of removal application ("withholding application"). 8 C.F.R. § 208.31(e). That person has a right to appeal an asylum officer's reasonable fear determination to an Immigration Judge. *Id.* at § 208.31(g). If the appeal is sustained, that person has the right to file a withholding application, which, if denied, may be appealed to the Board of Immigration Appeals and thereafter the Circuit. Pending administrative review of a withholding application, the government is barred from executing a reinstated removal order. *See* 8 C.F.R. § 1003.6(a).

Prendes, 2012 WL 3024209, at *1 (N.D. Tex. June 27, 2012), *R&R adopted*, 2012 WL 3024750 (N.D. Tex. July 24, 2012) (execution began where repatriation scheduled for next day).[4]

No date for removal or scheduled flight was secured for Arely on February 1, *see* Resp. Decl. ¶ 17, so the plain language of 1252(g) does not bar judicial review of her habeas challenge. Case in point: Respondents always planned to transfer her far away from the Alexandria, Louisiana staging facility (for imminent removals of those with pre-scheduled departure flights) on the day of her arrest—demonstrating that no date for removal had been set. *See supra*, Facts, at 3.

Second, even if this Court finds the government had made a decision to execute Arely's removal, her claims do not "aris[e] from" that decision. *Jennings v. Rodriguez*, 583 U.S. 281, 294 (2018) ("arising from" language should not "sweep in any claim that can technically be said to 'arise from' the three listed actions of the Attorney General"). This is because "Section 1252(g) was directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion." *AADC*, 525 U.S. at 485 n.9 (1999). Thus, where a petitioner is "not asking for review of an order of removal; they are not challenging the decision to detain them in the first place or to seek removal; and they are not even challenging any part of the process by which their removability will be determined," jurisdiction lies. *Jennings*, 583 U.S. at 294. Justice Alito's opinion in *Jennings* cautions courts to reject an "expansive interpretation of § 1252(g) [that] would lead to staggering

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[4] *See also Kong v. United States*, 62 F.4th 608, 618 (1st Cir. 2023) (distinguishing *Tazu*, which "held that judicial review was barred because the challenge was to 'brief door-to-plane detentions' that are 'integral to the act of executing a removal order' from detention "before deportation was certain") (internal alterations removed); *Bogomazov v. United States Dep't of Homeland Sec.*, No. 2022 WL 769801, at *10 (S.D. Fla. Feb. 27, 2022), *report and recommendation adopted*, 2022 WL 767104 (S.D. Fla. Mar. 14, 2022) (finding jurisdiction over claim related to actions before service of a Notice to Appear had "commenced" proceedings and distinguishing *Gupta v. McGahey*, 709 F.3d 1062, 1063 (11th Cir. 2013), which dismissed claims related to arrest and detention that occurred only after proceedings had "commenced"); *Khorrami v. Rolince*, 493 F. Supp. 2d 1061, 1069 (N.D. Ill. 2007) (finding jurisdiction over Fourth Amendment claims that preceded commencement of removal proceedings).

results . . . that no sensible person could have intended." *Id.* at 293-4 (internal quotation removed).[5] The test to determine whether a claim is "arising from" execution of a removal order "is not whether *detention* is an action taken to remove a [noncitizen] but whether *the legal questions* in this case arise from such an action." *Jennings*, 583 U.S. at 295 n.3 (emphasis in original). "Where those legal questions are too remote from the actions taken," jurisdiction is proper. *Id. Jennings* identified a non-exhaustive list of legal issues "too remote" to trigger 1252(g), including unconstitutional detention claims. *Id.* at 293.[6]

Here, too, the legal questions before this Court are too remote from a decision or action to execute a removal order to trigger 1252(g).[7] Confronted with the weight of case law against it, Respondents acknowledge that "the Fifth Circuit has not spoken to § 1252(g)'s reach recently," urging this Court to ignore *Jennings* in favor of pre-*Jennings* decisions in the Fifth Circuit. Opp. at 9. *Foster v. Townsley*, 243 F.3d 210, 214 (5th Cir. 2001), for example, rejected claims of excessive force occurring during execution of a removal order, but that was in alignment with Justice Thomas's reading of 1252(g) in *Jennings*, which the majority of the Court expressly

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5 Courts around the country have followed *Jennings'* narrow reading of § 1252(g). *See Osny Sorto-Vasquez Kidd v. Mayorkas*, 2021 WL 1612087, at *1 (C.D. Cal. Apr. 26, 2021), *adhered to sub nom. Kidd v. Mayorkas*, 645 F. Supp. 3d 961 (C.D. Cal. 2022) (finding that § 1252(g) did not bar a Fourth Amendment challenge to ICE removal arrests without true consent or a judicial warrant); *Nava v. Dep't of Homeland Sec.*, 435 F. Supp. 3d 880, 890 (N.D. Ill. 2020) (same for a Fourth Amendment challenge to race-based traffic stops by ICE); *Alam v. Nielsen*, 312 F. Supp. 3d 574, 580-581 (S.D. Tex. 2018) ("[H]abeas challenges to immigrant detention are among the claims that lie outside Section 1252(g)'s scope[,] including claims "against the process that ICE followed in cancelling [an OSUP] and returning [a non-citizen] to detention.").

6 By contrast, part of Justice Thomas's concurrence in *Jennings*, joined by only Justice Gorsuch, adopted the sweeping reading of 1252(g) that Respondents advance here: Because "detention . . . is meant to ensure that the Government can ultimately remove" a non-citizen, a habeas challenge to detention's legality is "arising from" an action to remove a non-citizen, and no court has jurisdiction over that claim. *Jennings,* 583 U.S. at 317 (Thomas, J., concurring). That reading was rejected by six other Justices (Justice Kagan took no part in the decision of *Jennings*). Yet Respondents press forward with it here, arguing that Arely's constitutional claims of unlawful detention at habeas are barred here because "securing a[noncitizen] while awaiting a removal determination constitutes an action to execute a removal order." Resp. at 11.

7 Those questions include, but are not limited to: must the government obey its own regulations when revoking an OSUP? Must the government abide by the Fourth Amendment when seizing a person? Must the government give constitutional due process to a person it deprives of liberty? *Compare Jennings*, 583 U.S. at 312-314 (ordering the court of appeals to consider plaintiffs' claims that their detention pending removal violated constitutional due process).

rejected. *See Jennings*, 583 U.S. at 283 (listing constitutional claims and torts over which courts retain jurisdiction, even if "those cases could be said to 'aris[e] from' actions taken to remove the [noncitizens] in the sense that the [noncitizens'] injuries would never have occurred if they had not been placed in detention") (alterations in original). *Foster* therefore does not bind this Court. To the contrary, *Jennings* mandates a different result. *See also Texas v. United States*, 126 F.4th 392, 417 (5th Cir. 2025) (finding that 1252(g) did not bar jurisdiction over APA claims challenging a deferred action program) (citing *Texas v. United States*, 809 F.3d 134, 164 (5th Cir. 2015)).

Third, even if this Court finds that Arely's claims "arise[] from" the "execution of a removal order," it maintains jurisdiction over her constitutional habeas claim, which requires judicial review—first under Article III,[8] and then under the Suspension Clause.[9] Her attendant APA and T-Visa claims are tethered to that poisonous tree, and are therefore equally appropriate for this Court to review. *Jennings*, 583 U.S. at 294. Arely seeks "simple release" (she is not seeking a stay of her removal) in her habeas petition.[10] Respondents' contention otherwise falls flat because they are simply wrong about the relief sought. Moreover, Respondents fail to point to any case law holding, let alone suggesting, that habeas is the wrong vehicle to challenge unconstitutional ICE detention. *See Webster v. Doe*, 486 U.S. 592, 603 (1988) ("serious constitutional question . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim"). Indeed, the opposite is true. *See Humphries v. Various Federal USINS*

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8 "The judicial power shall extend to all cases, in law and equity, arising under th[e] Constitution." U.S. Const. art. III, § 2.

9 "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when the Cases of Rebellion or Invasion the public safety may require it." U.S. Const. art. I, § 9, cl. 2.

10 On February 1, Arely believed her deportation was imminent and asked this Court to stay her removal in a TRO merely to preserve the status quo prior to adjudication of her claim against detention. But in light of assurances from Respondents that her deportation is not imminent, she seeks only release from detention.

Employees, 164. F. 3d 936, 945 (5th Cir. 1999) ("[Noncitizens] wishing to raise [constitutional] challenges in the future should do so in a petition . . . for habeas corpus . . . .").[11]

II. A PI in the Form of a Declaration and Release from Detention Is Appropriate.

Arely is likely to succeed on the merits of her Fourth Amendment claim. The attendant arrest, deficient OSUP revocation, and T-Visa claims all relate to that poisonous tree.

A. Arely Was Unconstitutionally Seized on February 1, 2025.

Respondents violated the Fourth Amendment when they arrested Arely on February 1 by using an unjustified ruse. Strikingly, they do not defend their actions as constitutional. They do not posit that there was no ruse, or that the ruse was lawful. Instead, they double down on their argument that this Court lacks jurisdiction to reign ICE in—no matter how flagrantly the agency violates the Constitution.

"Law enforcement does not have carte blanche to use deception to effect a . . . seizure." *United States v. Ramirez*, 976 F.3d 946, 955 (9th Cir. 2020); *Pagan-Gonzalez v. Moreno*, 919 F.3d 582, 591–92 (1st Cir. 2019) ("right to deceive . . . not unbounded"). Ruses, while legal in some contexts, are not legal in all. *See SEC v. ESM Government Securities, Inc.*, 645 F.2d 310, 316 (5th Cir.1981).[12] The purpose of the Bill of Rights, in part, is to provide "checks" on "official deception for the protection of the individual." *Lewis v. United States*, 385 U.S. 206, 209 (1966).

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[11] *Cf. Flores-Ledezma v. Gonzales,* 415 F.3d 375, 380-381 (5th Cir. 2005) (1252(g) did not bar constitutional challenge to statutory scheme permitting INS to exercise discretion concerning commencement of removal proceedings).

[12] Deception is reasonable under the Fourth Amendment where there is a "vital interest [. . . such as] not exposing [a government] investigation." *United States v. Alverez-Tejeda*, 491 F.3d 1013, 1017–18 (9th Cir. 2007). It is not reasonable where no such vital government interests are at play. *See United States v. Posada Carriles*, 541 F.3d 344, 356–57 (5th Cir. 2008) (holding that "the government may not make affirmative material misrepresentations about the nature of its inquiry"); *United States v. Parson*, 599 F. Supp. 2d 592, 605–06 (W.D. Pa. 2009) ("Numerous cases establish that government misrepresentation as to the purpose of the visit, or the scope of the investigation violates widely shared social expectations").

Just like every other law enforcement body, ICE "must comply with the Fourth Amendment." *Andrade-Tafolla v. United States*, 536 F. Supp. 3d 764, 773 (D. Or. 2021);[13] ICE Office of the Principal Legal Advisor, 4th Am. Training, Aug. 2017, at 46-48 (discussing contours of Fourth Amendment ruse case law, including permissible exigent circumstances, such as hot pursuit, emergency aid, officer safety, and imminent destruction of evidence). Arely does not dispute the government may have "important reasons for employing" a ruse. *United States v. Alverez-Tejeda*, 491 F.3d 1013, 1016 (9th Cir. 2007). The problem is: none are at issue here.

The analysis in *United States v. Tweel*, 550 F.2d 297 (5th Cir. 1977), is instructive. There, material misrepresentations from government officials were deemed unlawful under the Fourth Amendment. *Id.* at 298. In that case, Internal Revenue Service ("IRS") officials sought to perform a tax audit on defendant, which officials, similar to the situation here, characterized as routine. But IRS agents deliberately did not disclose that the audit was connected to a criminal probe. *Id.* Furthermore, they assigned an official who, per internal policy, was not required to advise targets of their legal rights (eerily similar to the contracting role of the ISAP officer here), further obfuscating the criminal nature of the audit. *Id.* at 300; Resp. Decl. ¶ at 13-14. The court characterized this omission as "intentionally misleading and material," a "sneaky deliberate deception," and "a flagrant disregard" for the defendant's constitutional rights. *Id.* at 299.

Here, inducing Arely to appear for an ICE check-in under the false promise of less restrictive supervision violated the Fourth Amendment, as no exigent circumstances justified a

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[13] *Ortiz Becerra v. Garland,* 851 F. App'x 739, 743 (9th Cir. 2021) (identifying ICE agents as police and presenting a definition of police as "an organization engaged in the enforcement of official regulations in a specified domain' such as 'transit police."') (quoting New Oxford American Dictionary (3d ed. 2010)); *see also City of El Cenizo v. Texas*, 890 F.3d 164, 189-90 (5th Cir. 2018); *Cruz v. Abbot*, 177 F.Supp.3d 992, 1005 (W.D. Tex. 2016), *overruled on other grounds by Cruz v. Abbot*, 849 F.3d 594 (5th Cir. 2017); s*ee United States v. Dioubate,* NO. 1:13-CR-40, 2013 WL 12064121, at *2 (E.D. Tex. Dec. 13, 2013) *aff'd*, 610 Fed. App'x. 400 (5th Cir. 2015). For this reason, ICE itself has noted that ruses are tools that may be used when there are threats to public safety. ICE, *Use of Ruses in ICE Enforcement Operations*, Aug. 22, 2006 ("One main objective of a ruse is to prevent violators from fleeing and placing themselves, officers, and innocent bystanders in a potentially dangerous situation").

ruse. *See infra,* Part II.B. (unlawful OSUP revocation argument). Arely had never violated her OSUP and was not a flight risk. And yet, at no point did Respondents inform her that they intended to revoke her OSUP and detain her. Instead, Arely was deceived about the true nature of her ICE check-in—her immediate arrest.

ICE's actions constitute an impermissible ruse because they were employed to deliberately evade following proper arrest procedures, *see infra* at Part II.B., and to prevent Arely from exercising her right to be free from an unreasonable seizure. *See Tweel,* 550 F.2d at 300 (ruse employed deliberately sought to prevent exercise of target's constitutional and statutory rights). Respondents deceived her, using a trusted messenger who inverted the true purpose of the check-in, demonstrating material and "deliberate deception." *Ramirez*, 976 F.3d at 954 (holding ruse unreasonable where agents invented a fictitious burglary to seize defendant outside scope of warrant); *U.S. v. Hardin*, 539 F. 3d 404, 418 (6th Cir. 2008) (similar ruse). As in *Tweel*, these representations circumvented Arely's Fourth Amendment rights and her rights under the APA.

At bottom, Respondents do not dispute that the text message from Respondent's contractor to Arely clearly stated a purpose materially different, and indeed opposite, to their true purposes. Nor do they dispute that their trickery resulted in an unlawful seizure under the Fourth Amendment. Hence, Arely has met her burden of showing the merit of her Fourth Amendment claim, and Respondents have unequivocally waived any argument to the contrary.

B. Respondents Violated the APA in Revoking Arely's OSUP.

Respondents do not dispute that, in taking Arely into custody, ICE was required by law to follow appropriate re-detention procedures as set forth in its own regulations.[14] Nor do they dispute

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[14] Arely also reasserts the argument made in her TRO motion, ECF No. 2-1 at 6-9, that, by taking her into custody based solely on her removal apparently now being foreseeable, the government deprived her of due process. In the end, that release revocation was not the product of any individualized review, and alleged no relevant change in circumstances altering the original assessment of her risk of flight. To comport with due process, immigration

that they did not follow the procedures set forth in 8 C.F.R. § 241.13. Rather, they merely argue that only 8 C.F.R. § 241.4(l)(2) applies, and that they followed the procedures set forth there. TRO Resp. at 15-17. But even *assuming arguendo* they are correct, that only § 241.4(l)(2) governs here, Respondents have not shown that ICE followed the minimal procedures set forth there, and so the arrest should be invalidated under the APA. *See* TRO Mot. at 8-9.

The decision to revoke release is discretionary, but the agency has voluntarily limited its discretion through its own regulations. There are at least three ways in which the agency failed to adhere to § 241.4(l)(2):[15] The appropriate official did not revoke the OSUP; no threshold basis for revocation existed; and none of the four necessary conditions for such revocation were met. Revoking Arely's OSUP was thus arbitrary and capricious. *See U.S. Chamber of Commerce v. U.S. Dep't of Labor*, 885 F.3d 360, 382 (5th Cir. 2018) ("Illogic and internal inconsistency are characteristic of arbitrary and unreasonable agency action.").

As an initial matter, the regulation specifies that only certain officials may revoke a release decision under § 241.4(l)(2): the "Executive Associate Commissioner" ("EAC") or the "district director." Those titles are holdovers from the former Immigration and Nationality Service; they are not currently titles within DHS or ICE. While the regulations do not specify which current official replaces the EAC, they do, in relevant part, define "commissioner" as the "Director of U.S.

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detention must bear a reasonable relationship to its two regulatory purposes: ensuring the appearance of noncitizens at future hearings, and preventing danger to the community pending the completion of removal. *See Zadvydas v. Davis*, 533 U.S. 690, 691 (2001). Here, there had been no changed circumstances regarding either flight risk or public safety, but ICE nevertheless detained Arely without notice, hearing, or even an interview. *See Rombot v. Souza*, 296 F. Supp. 3d 383, 388–89 (D. Mass. 2017) (finding a due process violation and explaining that ICE "never asserted that Rombot is a danger to the community or a flight risk, or that he violated the conditions of his [OSUP]. . . . The Supreme Court has recognized that a 'alien may no doubt be returned to custody upon a violation of [supervision] conditions,' but it has never given ICE a carte blanche to re-incarcerate someone without basic due process protection.") (quoting *Zadvydas*, 533 U.S. at 700).

15 If the government materially disputes the characterizations of the record that follow, Arely seeks an opportunity to cross-examine Declarant David Raynes. If the government seeks to supplement the record, Arely seeks additional time to adequately investigate any supplements and respond accordingly.

Immigration and Customs Enforcement." 8 C.F.R. § 1.2. That same regulation defines "district director" as, in relevant part:

> "director, field operations; district director for interior enforcement; . . . field office director; . . . . The terms also mean such other official, including an official in an acting capacity, within . . . U.S. Immigration and Customs Enforcement . . . who is delegated the function or authority above for a particular geographic district, region, or area."

Id. Respondents, however, have not provided evidence as to the identity of the official who revoked release. No specific official is reported as revoking release; nor is any date of such a decision reported. Absent any evidentiary support that the proper official revoked Arely's OSUP, this Court should find that the agency did not follow § 241.4(l)(2).

Second, the regulation also provides two sets of conditions that must be fulfilled prior to revocation. The first set provides threshold conditions for each type of permitted decision-making official. There appear to be no preliminary requirements for the EAC's exercise of discretion to revoke release. 8 C.F.R. § 241.4(1)(2). The "district director," however, can only revoke release when (1) "revocation is in the public interest" and (2) "circumstances do not reasonably permit referral of the case to the [EAC]." *Id.* Because the record does not reflect who revoked Arely's release, it is unclear which procedure applies. But there is no debate that some procedure applied and that no evidence of compliance has been presented. The record does not reflect any determinations that OSUP revocation would be in the "public interest" and that "circumstances d[id] not reasonably permit referral of the case to the [EAC]." *Id.* It is equally unclear what "public interest" is served by revoking the release of someone who is a trafficking victim and has fully cooperated with their release terms. *Id.* There is no suggestion that Arely's removal is an emergency, or that referral to the EAC could not have occurred while she was on her OSUP.

Thus, the second way that the agency did not follow § 241.4(l) is related to the first: there

is no evidence that the agency fulfilled any of the threshold requirements for the decision to revoke release. *See Rombot v. Souza*, 296 F. Supp. 3d 383, 387 (D. Mass. 2017) (finding that ICE violated § 241.4(l) where record did not show that the Field Office Director ever made the "threshold determination" that . . . 'revocation [was] in the public interest and circumstances [did] not reasonably permit referral . . . to the [equivalent of the EAC].'") (quoting 8 C.F.R. § 241.4(l)(2)).

Third, once any threshold requirements have been fulfilled, the regulation at issue then provides four conditions – set forth in §§ 241.4(l)(2)(i)-(iv) – one or more of which must be fulfilled to revoke release. Such a determination must be made by any "revoking official," meaning, the conditions apply regardless of which permitted decisionmaker revokes release. *Id.* § 241.4(l)(2). Respondents' claim that Arely was released on an OSUP "for medical reasons" is odd, because Arely neither requested such an accommodation, nor was seen by a medical professional who might have made such a recommendation. *See supra*, Facts, at 3. Stranger still, the Raynes Declaration mysteriously reports that "[a]fter 6 months, the purpose of the OSUP was served" without saying: (1) how that determination was made or by whom; (2) why the "medical reason[]" that necessitated release in the first place was resolved or otherwise no longer an issue; or (3) how ICE was made aware that the "medical reason[]" was resolved. Resp. Decl. ¶ 16. The Raynes Declaration's sparse and conclusory statements are insufficient to demonstrate that revocation was grounded in one or more of the four required conditions. At the very least, his cross-examination is necessary to understand the agency's bases for OSUP revocation. Regulations exist in part to prevent arbitrary and capricious action, including OSUP revocation; when agencies act in violation of them, the law rightly invalidates such action.

C. Petitioner Has a Due Process Interest in Having Her T-Visa Adjudicated.

Arely's due process interest in having her T Visa adjudicated cannot be cut short by

Respondents' unconstitutional ruse. *See Mathews v. Eldridge*, 424 U.S. 319, 333-34 (1976) (finding that fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner") (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)); *S.N.C. v. Sessions,* 2018 WL 6175902, at *6 (S.D.N.Y. Nov. 26, 2018) (granting habeas relief because, in part, "[p]etitioner has a right to make the [visa] applications and have them fully adjudicated without undue interference.") (citing *S.N.C. v. Sessions*, 325 F. Supp. 3d 401, 411-12 (S.D.N.Y. 2018). While it is true that Arely only recently filed her T-Visa application, that does not give ICE carte blanche to vitiate her due process interest in adjudication of her petition. Respondents rely on inapposite case law on pending U-Visa applications, which do not have the same presence requirements as T-Visa applications. Opp. at 20 (citing *Velarde-Flores*, *Rodriguez-Sosa*, *Balogun,* and *Mingrone*). In the single T-Visa case they cite, the court found that petitioner did not address why ICE procedures were inadequate in protecting his liberty interest as a matter of law. *Nicholas L. L. v. Barr,* 2019 WL 4929795, at *7 (D. Minn. Oct. 7, 2019). In the end, while Respondents argue that Congress "did not want the submission of a T visa application alone to be a wholesale bar to removal," Opp. at 21, it is implausible to suggest that Congress gave ICE authority to pretermit any T-Visa application by deporting someone before it is adjudicated.

CONCLUSION

Government officials violate the Constitution when, as here, they engage in an unjustified ruse to seize someone, absent exigent circumstances, in order to vitiate their rights. ICE had no reason to engage in trickery here because Arely would have appeared for a check-in if asked. Indeed, she had consistently done so pursuant to her OSUP. The Fourth Amendment does not condone deception for deception's sake, and this Court should not hold so here. A PI issued in Arely's favor, declaring arrests without proper procedural protections unlawful, is appropriate.

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Respectfully submitted,

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