UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Arely Westley, *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 SUPPLEMENTAL BRIEFING

PRELIMINARY STATEMENT

Three core arguments were raised at oral argument in this matter. Each is addressed in turn.

As an initial matter, jurisdiction exists because Petitioner's unlawful detention did not "arise from" a decision or action to "execute" a removal order.[1] This is so because the evidence does not show that a date certain for her actual deportation ever existed. And, in any event, the legal questions raised by Petitioner do not interfere with the executive's decision to execute a removal order. Indeed, she may be re-arrested in a constitutionally appropriate manner and her removal may occur once her pending fear-based relief claim has been exhausted.

Additionally, Petitioner is likely to succeed on the merits of her claims because Respondents unlawfully arrested her pursuant to a ruse the Fourth Amendment does not support and failed to follow their own OSUP[2] revocation regulations. Here, where an OSUP is in play, the post-order custody review regulations at § 241.4(k)(3) are not applicable. For the avoidance of any doubt, Respondents never argued Petitioner's ruse was constitutional or that they followed their own regulations. Instead, in distancing themselves from the contractor who sent the text message at issue, they simply argued that § 1252(g) forecloses consideration of the issue because it places the process by which removal takes place (be it legal or illegal) above the Constitution.

Finally, Petitioner meets the other three elements for a PI. First, black letter law establishes that deprivation of one's constitutional rights constitutes irreparable injury. Second, the balance of equities favor issuing a PI because it will merely maintain the status quo that existed before

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[1] As Petitioner noted at oral argument, the initial pleadings in this matter were filed on an emergent basis and, as such, the request for relief sought was broad. Petitioner was always seeking simple release and declaratory relief and never sought to ask this Court to exercise jurisdiction it did not have. Respondents regardless have since made clear that there are no immediate plans to remove Petitioner from the United States, taking any potential stay request off the table.

[2] All short-cite conventions in Petitioner's Reply Brief are used in this supplemental filing. *See* ECF No. 24.

Petitioner's unlawful arrest. Third, the public interest is served through enforcement of constitutional constraints on unlawful government action.

Petitioner thus asks this Court to convert the TRO in place to a PI.

ARGUMENT

I. THIS COURT HAS JURISDICTION.

At issue in this case is whether Respondents conducted an unlawful arrest of a non-citizen pending possible removal at some unknown, future date, not whether Respondents have discretion to execute a removal order. The narrow jurisdiction-stripping provisions of § 1252(g) encompass only questions that "arise from" a decision or action to "execute" a removal order, not a generalized plan to do so one day if fear-based proceedings do not result in relief from removal.

a. Petitioner's claims do not "arise from" execution because they do not challenge discretion to execute a removal order.

Even if an arrest pending adjudication of a fear-based claim for relief could be construed as execution of a removal order, Petitioner's claims do not "arise from" such execution. This is because the "aim of § 1252(g) is to protect from judicial intervention the Attorney General's long-established discretion to decide whether and when to prosecute or adjudicate removal proceedings or to execute removal orders." *Cardoso v. Reno*, 216 F.3d 512, 517 (5th Cir. 2000) (internal quotations and citations removed); *see also Elyakoubi v. Gonzales*, 155 F. App'x 807, 809 (5th Cir. 2005) (stating that § 1252(g) was "designed to give some measure of protection to 'no deferred action' decisions and similar discretionary determinations..."). This petition does not challenge that discretion. If granted, Respondents would remain free to exercise their discretion to execute Petitioner's removal order, should they determine she is not entitled to fear-based relief.

In *Reno v. American-Arab Anti-Discrimination Committee* ("*AADC*"), consistent with the presumption of judicial review, *see Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 229 (2020), the

Supreme Court emphasized that § 1252(g) does not strip jurisdiction for the "universe of deportation claims," but rather for a "narrow" class of noncitizen challenges that "arise from" "discrete actions" of the Attorney General. 525 U.S. at 484. Later, the Court repeated that the "arise from" language "did not . . . sweep in any claim that can technically be said to 'arise from' the three listed actions" but "just those three specific actions themselves." *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018) (citing *AADC*, 525 U.S. at 471).[3]

The Fifth Circuit consistently applies § 1252(g) narrowly, in line with *AADC*. *See, e.g.*, *Texas v. United States*, 126 F.4th 392, 417 (5th Cir. 2025) (affirming that the Supreme Court and Fifth Circuit have already held that §1252(g) does not preclude federal courts from exercising jurisdiction over any claims simply arising from a deportation order and that it is not a "sort of 'zipper' clause that says "no judicial review in deportation cases unless" the section expressly provides for it); *Kale v. U.S. I.N.S.*, 37 F. App'x 90 (5th Cir. 2002) ("The mere fact that deportation proceedings might later be initiated [or a removal order might later be executed] against Kale does not bring this case within narrow reach of § 1252(g)"); *Cardoso*, 216 F.3d at 516-17 (finding that "[§] 1252(g) does not prevent plaintiffs from challenging 'other decisions or actions that may be part of the deportation process'" and does not bar judicial review of "a [noncitizen] detention order, because such an order, 'while intimately related to the efforts to deport, is not itself a decision to 'execute removal orders' and thus does not implicate section 1252(g)'").

Where, as here, a Petitioner's claims do not challenge the government's discretion to decide or take action to execute a removal order, they do not "arise from" execution of that order. *See*

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[3] In *Jennings*, when the Supreme Court referenced a "decision to detain" as an action "arising from" the execution of a removal order, it referred to the government's initial discretionary decision to apply the detention statute to petitioners. But when petitioners challenged the government's *method* of applying that statute as unconstitutional, the Supreme Court found that that claim did not "arise from" a decision to commence, adjudicate, or execute a removal order, and thus was reviewable. 138 S. Ct. at 841.

Villafuerte v. United States, No. 7:16-CV-619, 2017 WL 8793751, at *8 (S.D. Tex. Oct. 11, 2017) ("*Humphries* makes clear that the mere fact that an alien is in custody because of the decision to commence proceedings against her does not necessarily mean that any abuse or violation of law she suffers during her time in custody necessarily arises from that decision for the purposes of § 1252(g)") (citing *Humphries v. Various Federal USINS Employees*, 164 F.3d 936, 944 (5th Cir. 1999)); *De La Paz v. Coy*, 954 F. Supp. 2d 532, 544 (W.D. Tex. 2013), *rev'd in part*, 786 F.3d 367 (5th Cir. 2015) (finding that plaintiff's Fourth Amendment injuries during an arrest pursuant to a traffic stop preceded the decision to commence removal proceedings and were thus not barred by § 1252(g), despite the government's assertion that the plaintiff was at the time of the challenged seizure "subject to removal"); *Alvarez-Zavala v. I.N.S.*, 2004 WL 420030, at *5 (N.D. Tex. Feb. 19, 2004), *report and recommendation adopted*, 2004 WL 925365 (N.D. Tex. Mar. 12, 2004) (finding that petitioner's challenge to his "unlawful detention" and request for declaratory relief..."do not appear to implicate § 1252(g)."). Petitioner's claims leave that discretion undisturbed. Jurisdiction over her petition is thus proper.

b. The record does not support an imminent removal.

Respondents considered Petitioner to be "awaiting a removal determination" when they arrested her; they were not executing a removal order. Opp. at 11. At argument, Respondents' counsel offered the carefully worded, but unsupported statement that ICE merely "had *plans* to remove this individual from the United States . . . ." Tr., ECF No. 28 at 45 (emphasis added).

At issue here is a generalized plan to one day execute an order of removal after a fear-based application for relief has been adjudicated. At argument, Respondents conceded that even if Petitioner were determined to lack reasonable fear, "ICE would pick up the process of removal. So they would pick back up in terms of coordinating with Honduras and making sure the

documentation was squared away, scheduling the flight, and getting travel arranged." Tr., ECF No. 28 at 48. That does not meet the narrow meaning this Court must give to "execute" in § 1252(g). No doubt there are cases in which arrest following reinstatement of removal has been deemed an execution of a removal order: when arrest is for the purpose of taking someone to board a deportation flight, for example; or for detaining them after a flight has been scheduled – the very conduct the Respondents conceded had not yet been accomplished at the time of Petitioner's arrest. *See* Pet. Reply, ECF No. 24 at 5-6, n.4 (collecting cases). But the evidence before this Court shows that Petitioner's arrest did not meet those conditions and an administrative procedure remained to be concluded before any action or decision to execute a removal order could be taken.

Respondents' contention that arrests following reinstatement of removal must be a decision to "execute" fails to address numerous Courts of Appeals decisions that define execution of a removal order as beginning only once the government has chosen a date certain for deportation. *See* Pet. Reply, ECF No. 24 at 5-6, n.4 (collecting cases). It also leads to absurd results. Under Respondents' theory, courts must credit the government's unsupported claim that it is executing a removal order, no matter how long that process may take. But, the Supreme Court has consistently found jurisdiction to hear claims challenging the constitutionality of prolonged immigration detention, including for people with final orders of removal. *See, e.g.*, *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018); *Zadvydas v. Davis*, 533 U.S. 690, 691 (2001). Just as bewildering is counsel for Respondents' suggestion of a temporary "execution" that occurs at the moment a removal order is reinstated but disappears upon a request for fear-based protection from removal. Tr., ECF No. 28 at 50 ("I do want to note that at the time when petitioner was arrested . . . none of the reasonable fear stuff was even on the table. . . . And that's the point in time we're determining was the Government planning to remove someone imminently . . . ."). Under Respondents' framework,

Congress supposedly intended for there to be no enforceable legal limits on arrest at one minute, only for the Constitution to spring back into action the next. Simply put, this cannot be the case.

Nothing in the record establishes a date certain for deportation here. In fact, no record evidence demonstrates that *any* actions took place to make arrangements to execute a removal order after a July 2024 reinstatement of removal determination occurred. ECF No. 20-2 p. 8. Respondents' Warrant of Removal, an ICE arrest warrant, is merely an administrative document required to take her into custody and does not demonstrate that they had taken any action to actually deport Petitioner; indeed, such administrative warrants are limited in authority.[4] Further, Respondents' wholesale failure to properly revoke Petitioner's OSUP further indicates that they did not take the specific actions required to "execute" her removal. *See infra* Section II(b). In short, Respondents provide no evidence that they had begun to "execute" Petitioner's reinstated removal order, as defined by numerous courts, by setting a date certain for deportation. So, jurisdiction lies.

II. PETITIONER IS LIKELY TO SUCCEED ON THE MERITS.

The government has declined to defend the legality of Petitioner's arrest, banking instead that this Court is powerless to remedy it. But Petitioner has shown a likelihood of success on her claims.

a. Respondents violated the Fourth Amendment though their actions in carrying out the Intensive Supervision Appearance Program.

Respondents created, oversee, and control ISAP. They contract with the GEO Group and its wholly-owned subsidiary BI Incorporated to manage orders of supervision, and have done so since 2004.[5] ICE's website on ISAP explains that it "developed" the programs and selects

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[4] Congressional Research Service, *Immigration Arrests in the Interior of the United States: A Primer* (Nov. 30, 2021), https://crsreports.congress.gov/product/pdf/LSB/LSB10362.

[5] https://investors.geogroup.com/news-releases/news-release-details/geo-group-announces-five-year-contract-us-immigration-and

individuals for participation.[6] Respondents cannot dispute that ISAP is *their* program and the decisions to place an individual in the program—and indeed, the decision to revoke their participation—lie wholly with Respondents. Ultimately, Respondents are responsible for the ruse at issue, knowing that Petitioner was in the ISAP program, received an invitation to be moved to an "M Site" program, and appeared as ordered for the appointment. Respondents were certainly aware of this ruse by the time Petitioner checked in. Respondents' total control and oversight of ISAP establishes that they, and they alone, are liable for Petitioner's unconstitutional arrest.

b. Respondents violated the APA by revoking Petitioner's OSUP.

Where, as here, a person has been released from ICE detention, § 241.4(l) governs and lays out procedural requirements that must be followed by specified government officials, *even if* removal is anticipated. That subsection falls within the regulatory framework in 8 C.F.R. § 241.4, which discusses the continued detention or release of certain individuals who have a removal order. Section 241.4(l) was not followed here, in violation of the APA.

Another subsection, § 241.4(k), is not applicable. That subsection explains the timing of the post-final order custody review process, including those reviews undertaken by the Headquarters Post-Order Detention Unit. §§ 241.4(k)(1)-(2). Section 241.4(k)(3) discusses the ability to suspend or postpone these reviews in the event removal is practicable and proper. But the procedures explained in § 241.4(k) specifically govern post-removal order *custody reviews* for individuals in ongoing detention—they have no bearing here, where release has *already* occurred.

Within this context, DHS has long-standing guidance that explains how legal authority may be delegated, and to whom.[7] The relevant authority here–§ 241.4(l) concerning OSUP revocation–

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[6] https://portal.ice.gov/immigration-guide/atd

[7] Department of Homeland Security, *Delegation of Authority to the Directors, Detention and Removal Investigations, and to Field Office Directors, Special Agents in Charge and Certain Other Officers of the Bureau of Immigration and Customs Enforcement* (June 6, 2003).

is delegated to the "Director, Detention and Removal; Deputy Assistant Director, Field Operations Division; Field Office Directors; Deputy Field Office Directors; and Officers In Charge." *Id.* at (2)(A)(2). While here, the authority at issue does appear to have been properly delegated, the required regulation procedures were not followed. The myriad of documents Respondents appended to their opposition brief do not change this fact. ECF No. 20-2.

For starters, none of the documents demonstrate that the Revocation of Removal process properly occurred in accordance with § 241.4(l). Respondents submit the following:

- Warrant of Removal/Deportation, dated February 1, 2025 and signed by the Acting Field Office Director (ECF No. 20-2 at 3-4);
- Notice of Custody Determination, dated February 1, 2025 (ECF No 20-2 at 5-6);
- Assumption of Custody Notification, dated February 1, 2025 (ECF No. 20-2 at 7);
- Certification of Reinstatement of Removal (ECF No. 20-2 at 8);
- OSUP, dated July 8, 2024 (ECF No. 20-2 at 10-13).

ECF No, 20-2 at 10-15. While the Acting Field Office Director, Scott Ladwig, is the Deputy Field Office Director, meaning he is the proper delegated authority named in ICE policy, there is no record of any determination that "revocation [was] in the public interest and circumstances [did] not reasonably permit referral of the case to the [equivalent of the Executive Associate Commissioner]." 8.C.F.R. § 241.4(l)(2); *see Rombot v. Souza*, 296 F. Supp. 3d 383, 387 (D. Mass. 2017). There is no revocation notification to Petitioner that her OSUP was being revoked. Nor is there any indication that *any* steps in the revocation process occurred until February 1, 2025, the very date Petitioner reported as ordered for the stated purpose of transferring her to the "M Site" program. Respondents' suggestion that, but for the Court's intervention, they would have removed her is pure chimera as there is not a single document in the record that supports this proclamation. Without that documentation, their defense to the APA violations fails. *Id.*

III. PETITIONER MEETS THE ELEMENTS FOR A PI.

Petitioner has shown irreparable injury by alleging the deprivation of her Constitutional and statutory rights. Absent Court intervention, Respondents will continue to violate her constitutional rights via this unlawful arrest. "When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Book People, Inc. v. Wong*, 91 F.4th 318, 340–41 (5th Cir. 2024) (*citing Opulent Life Church v. City of Holly Springs,* 697 F.3d 279, 295 (5th Cir. 2012)). Here, Respondents have deprived Petitioner of her Fourth Amendment rights and additionally violated her rights under the regulations. The declaration sought by Petitioner is appropriate, *see* ECF 1 at 19 ("Declare that Arely's detention violates the INA, regulations and the Due Process Clause of the Fifth Amendment because she has been released on an OSUP...Declare that Arely's unlawful detention violated her rights under the Fourth Amendment"), as she has demonstrated irreparable harm in its absence.

Nor would ICE be prejudiced by granting Petitioner's requested PI, because it can perform any and all of its legitimate functions *lawfully*.

Finally, Petitioner has likewise satisfied the remaining requirements for PI: the balance of equities weighs in her favor and an injunction is in the public interest. It is true that courts have held that these "factors merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). But in every case, each "court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Texas v. United States*, 524 F. Supp. 3d 598, 663 (S.D. Tex. 2021) (internal quotations and citations removed). As to the balance of equities, Petitioner's requested injunction would do nothing more than invalidate an illegal arrest, grant her simple release, and declare that her rights were violated. An injunction would restore her liberty to the circumstances that existed on January 31, 2025, *i.e.*

prior to the unlawful arrest. The impact of an injunction on Respondents is minimal; even recognizing a governmental interest in the execution of Respondents' duties, nothing in Petitioner's requested relief prevents them from performing those duties—in this matter or in any other—as long as they do so in a constitutional and administratively permissible manner.

At bottom, Petitioner's requested PI concerns a constitutional violation that intrinsically satisfies the PI standard relating to public interest as a matter of law. "The Fifth Circuit has held that injunctions protecting constitutional freedoms are always in the public interest." *Viet Anh Vo v. Gee*, No. CV 16-15639, 2017 WL 1091261, at *6 (E.D. La. Mar. 23, 2017) (*citing Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 539, (5th Cir. 2013)). "Conversely, [p]ublic interest is never served by a state's depriving an individual of a constitutional right." *Arnold v. Barbers Hill Indep. Sch. Dist.*, 479 F. Supp. 3d 511, 531 (S.D. Tex. 2020) (citing *Kite v. Marshall*, 454 F. Supp. 1347, 1351 (S.D. Tex. 1978)).

Here, Petitioner alleges that the unlawful ruse that ICE used to seize her violated her Fourth Amendment rights and continues to infringe on her liberty. She asserts a constitutional injury, satisfying the legal test at issue. It is therefore appropriate to grant a preliminary injunction to restore her liberty.

CONCLUSION

For these reasons, Petitioner requests that this Court order a preliminary injunction.

Date: February 19, 2025

Respectfully submitted,

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