District Court Judge James L. Robart
Magistrate Judge Brian A. Tsuchida

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CARLOS VELASCO GOMEZ, Petitioner, vs. BRUCE SCOTT, *et al.*, Respondents.	Case. No. 2:25-cv-522-JLR-BAT Agency No. [redacted] PETITIONER'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS Noting Date: May 23, 2025

INTRODUCTION

Petitioner, Carlos Velasco Gomez, through counsel, hereby responds to the Government's Return and Motion to Dismiss and continues to respectfully move this Court for a stay of removal and immediate release from detention. The Government argues that Petitioner's detention pending his removal to Mexico is lawful pursuant to 8 U.S.C. § 1231(a), and that USCIS's grant of deferred action does not provide him with a stay of removal pursuant to 8 C.F.R. § 214.14(c)(1)(ii). This argument is unavailing because the government's own policies and regulations affirm that deferred action functions as a stay of removal, and furthermore, a noncitizen in deferred action status is lawfully present. Lastly, in the companion APA complaint he filed, the Petitioner challenges the

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Defendants' arbitrary and capricious decision to *per se* revoke Plaintiff's grant of deferred action, by detaining him and seeking to execute his removal to Mexico, without "good cause shown," notice and opportunity to respond as required by the applicable regulations, in violation of his due process rights under the law. Petitioner intends to file a motion to consolidate these matters as soon as practicable.

Additionally, the Government, primarily relying on *Velarde-Flores v. Whitaker*, 750 Fed. Appx 606, 607 (9th Cir. 2019), argues that because Ms. Velasco Gomez seeks judicial review of ICE's execution of his reinstated removal order, "it facially falls within the statutory jurisdictional bar" under 8 U.S.C. §1252(g), and thus deprives this court of jurisdiction. Gov't Return, pp. 6-9. The government's argument sidesteps the issue at the heart of Mr. Velasco Gomez's claim, and that is whether the government can execute a noncitizen's removal, reinstated or not, when the government has granted that noncitizen deferred action status. The statutory jurisdictional bar under 8 U.S.C. §1252(g) does not relieve the government of its burden to follow its own regulations.

ARGUMENT

(A) The Court Otherwise has Jurisdiction to Stay Petitioner's Removal

1. Section 1252(g) Does Not Bar Jurisdiction Because Petitioners' Claim Does Not Arise From ICE's Decision to Execute the Final Removal Order

In determining whether this court has jurisdiction over Mr. Velasco Gomez's claims, the threshold question is not whether the petitioner seeks a stay of removal but instead whether the court has jurisdiction over the claims presented in the complaint.

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In *U.S. v. Hovsepian*, the Ninth Circuit considered whether the district court has jurisdiction to consider a legal question (whether a judicial recommendation against deportation was valid) that would effectively render an order of removal invalid. The court held that the district court may consider a legal question that does not challenge the Attorney General's discretionary authority to commence proceedings, adjudicate cases, or execute removal orders, even if the answer to that legal question will preclude ICE from executing the removal order. The claim – that ICE has made a legal error by refusing to recognize the validity of the JRAD – does not arise from ICE's decision to execute the removal order; it arises from a dispute about the effectiveness of a JRAD and thus district court jurisdiction is not barred by §1252(g). *Hovsepian*, 359 F.3d at 1155.

Similarly in *Walters v. Reno*:

> By its terms, §1252(g) does not prevent the district court from exercising jurisdiction over the plaintiffs' due process claims. Those claims do not arise from a "decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien," but instead constitute "general collateral challenges to unconstitutional practices and policies used by the agency." "Because the district court clearly had jurisdiction to hear the claims regarding constitutional violations in the context of the document fraud proceedings, it had jurisdiction to order adequate remedial measures, including injunctive provisions [enjoining deportation] that ensure that the effects of the violation do not continue."

Walters v. Reno, 145 F.3d 1032, 1052-53 (9th Cir. 1998).

The Sixth Circuit has also recognized that a claim does not necessarily "arise from" one of the three specified actions in §1252(g) even though the relief granted may prevent ICE from executing an order of removal. The petitioners in that case claimed that the prior removal proceedings violated due process because of ineffective assistance of counsel, and sought an order requiring a new hearing. The Sixth Circuit held that the petitioner's claim was not barred:

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> The fact that the Mustatas in their petition seek a stay of deportation does not make their claim one against the decision to execute a removal order. The substance of their claim is that their counsel's failure to investigate and present relevant evidence resulted in a violation of their due process rights. Whether or not the Attorney General executes a removal order against the Mustatas is immaterial to the substance of this claim. Respondents' argument to the contrary confuses the substance of the Mustatas' claim with the remedy requested.

Mustata v. DOJ, 179 F.3d 1107, 1022-23 (6th Cir. 1999).

Although courts are not uniform on the issue, Mr. Velasco Gomez maintains that under *Hovsepian*, *Walters*, and *Mustata*, the question for purposes of §1252(g) is not whether the requested relief would interfere with the execution of an order of removal. The question is whether the claim presented in the complaint challenges ICE's discretionary decision to execute a removal order. If the claim presented in the complaint challenges a collateral matter, then the district court's jurisdiction is not barred by §1252(g).[1]

"The Ninth Circuit has held consistently that Section 1252(g) should be interpreted narrowly." *Doe v. Noem*, No. 2:25-cv-01103-DAD-AC, 2025 U.S. Dist. LEXIS 73572, at *20 (E.D. Cal. Apr. 17, 2025) (*quoting Sied v. Nielsen*, No. 17-cv-06785-LB, 2018 U.S. Dist. LEXIS 35696, 2018 WL 1142202, at *21 (N.D. Cal. Mar. 2, 2018) (citing *United States v. Hovsepian*, 359 F.3d 1144, 1155 (9th Cir. 2004) (en banc))). "The focus of Section 1252(g) is to limit 'judicial constraints upon prosecutorial discretion.'" *Id.* "By contrast, Section 1252(g) does not divest courts of jurisdiction over cases that do not address prosecutorial discretion and address 'a purely legal question, which does not challenge the Attorney General's discretionary authority[.]'" *Id.*

[1] Some district courts hold to the contrary. *See, e.g. Balogun v. Sessions*, 330 F. Supp. 3d 1211, 1215 (C.D. Cal. 2018) ("a challenge to ICE's refusal to stay removal is the paradigmatic claim arising from a decision to execute a removal order"); *Ma v. Holder*, 860 F. Supp. 2d 1048, 1059 (C.D. Cal. 2012) (holding, without analysis of *Walters* or *Hovsepian*, that district court has no jurisdiction under §1252(g) because petitioners request a stay of removal).

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Therefore, "[t]he district court may consider a purely legal question that does not challenge the Attorney General's discretionary authority, even if the answer to that legal question—a description of the relevant law—forms the backdrop against which the Attorney General later will exercise discretionary authority." *Hovsepian*, 359 F.3d at 1155.

Under the Supreme Court's decision in *Nken v. Holder*, if a court has jurisdiction over the claims presented, then the court has power to hold an administrative order in abeyance pursuant to the All Writs Act. All Writs Act, 28 U.S.C. § 1651(a) ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."). Thus, a request for a stay of removal – when the district court has jurisdiction over a collateral claim – is not a claim that arises from a decision to execute a removal order. As explained above, *see Hovsepian, Walters* and *Mustata*, the appropriate inquiry under §1252(g) is not whether a stay would temporarily interfere with ICE's ability to execute the final removal order—the answer may be "yes" – but the question is whether the claim arises from ICE's decision to execute the final removal order.

Here, Mr. Velasco Gomez is not asking this court to review ICE's discretionary decision to either stay his removal order or execute it. Mr. Velasco Gomez is asking for this Court to find that his removal has *already been stayed* by the government's grant of deferred action, that the should have the same legal force and effect regardless of who sits in the oval office, that he cannot be removed in contraversion of that stay, and as such, that he is unlawfully detained in violation of the INA and Due Process Clause of the Fifth Amendment to the United States Constitution.

Accordingly, this court has jurisdiction over Mr. Velasco Gomez's claims and the Government's motion to dismiss must be denied.

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2. The Suspension Clause

The Suspension Clause provides that Congress can restrict habeas jurisdiction, but only if there is an "adequate and effective" alternate mechanism for judicial review of the petitioner's claims. *Swain v. Pressley*, 430 U.S. 372, 381 (1977); *Boumediene v.* Bush, 553 U.S. 723, 779 (2008). *See also* R. Fallon, Applying the Suspension Clause to Immigration Cases, 98 *Colum. L. Rev.* 1068, 1084 (1998) ("the Suspension Clause functions as fall-back or default rule: If other, adequate mechanisms of judicial review of detentions are not provided, the traditional device of habeas corpus review cannot be suspended").

If this court determines that §1252(g) precludes judicial review of Mr. Velasco Gomez's claims, then §1252(g) violates the Suspension Clause. Mr. Velasco Gomez claims that he has been granted a stay of removal and has a right to its legal force and effect.

The Suspension Clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." *Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 116, 140 S. Ct. 1959, 1968-69 (2020) (quoting U. S. Const., Art. I, §9, cl. 2). The Clause, at a minimum, "protects the writ as it existed in 1789," when the Constitution was adopted. *INS* v. *St. Cyr*, 533 U. S. 289, 301, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001) (internal quotation marks omitted). Habeas "is the appropriate remedy to ascertain . . . whether any person is rightfully in confinement or not." *Thuraissigiam*, 591 U.S. at 117 (quoting *See 3 Commentaries on the Constitution of the United States §1333,* p. 206 (1833)0; *see also, e.g., Preiser* v. *Rodriguez*, 411 U. S. 475, 484, 93 S. Ct. 1827, 36 L. Ed. 2d 439 (1973) ("It is clear . . . from the common-law history of the writ . . . that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional

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function of the writ is to secure release from illegal custody"); *Wilkinson* v. *Dotson*, 544 U. S. 74, 79, 125 S. Ct. 1242, 161 L. Ed. 2d 253 (2005) (similar); *Munaf* v. *Geren*, 553 U. S. 674, 693, 128 S. Ct. 2207, 171 L. Ed. 2d 1 (2008) (similar).

As such, in the alternative, this court has jurisdiction over Mr. Velasco Gomez's habeas claim under the Suspension Clause, and the Government's motion to dismiss must be denied.

3. Release from Detention

The statute provides different rules for detention while removal proceedings are pending and after removal proceedings are completed. *See* 8 U.S.C. §1226(a) (detention during removal proceedings) and 8 U.S.C. §1231(a) (detention after removal proceedings are completed). Once a final removal order is issued, a person subject to deportation is detained during a 90-day "removal period." 8 U.S.C. §1231(a)(2). After the 90-day removal period, if the person is not removed, the person is subject to supervision. 8 U.S.C. §1231(a)(3). In many cases, as in this case involving Mr. Velasco Gomez, ICE allows the person ordered deported to remain in the United States after the removal period has expired. In these cases, the statute does not provide authority for ICE to continue to detain without a determination that the person is either a danger to the community or a flight risk.

In *Ulysse v. DHS*, 291 F.Supp.2d 1318 (M.D. Fla. 2003), a final order of deportation was issued against the petitioner in March 2002, the removal period began in April 2002 and expired in July 2002. ICE took no steps to remove the petitioner until a year later, after she married a U.S. citizen and appeared for an interview. At the interview, ICE arrested the petitioner without warning, held her in detention, and began to take steps to remove her. She then filed a motion to reopen her removal proceedings and sought release from detention on the grounds that the statute

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did not authorize her detention. The court held that it had jurisdiction to resolve the petitioner's claim. "Ulysse's claim that she is being unlawfully detained because Respondents have violated the removal statute is a pure question of law, and therefore, clearly within the habeas jurisdiction of this Court." 291 F.Supp.2d at 1324, *citing Zadvydas v. Davis*, 533 U.S. 678, 688 (2001). The court held the detention to be unlawful. *Id.* at 1326. The court commented:

> The Court also questions what possible policy objective would be accomplished by incarcerating Ulysse, at the taxpayers' expense, while her administrative proceeding and judicial review are in progress. Obviously, Respondents have no concern that Ulysse is a flight risk or a danger to society because they made no effort to remove or detain her sooner.

291 F.Supp.2d at 1326, n. 13. *See also You v. Nielsen*, 321 F.Supp.3d 451, 462 (S.D.N.Y. 2018) (accepting habeas jurisdiction and holding that ICE did not have the authority to detain the petitioner after the removal period expired without a finding of danger to the community or flight risk); *Farez-Espinoza v. Chertoff*, 600 F.Supp.2d 488, 502 (S.D.N.Y. 2009) (same).

In this case, ICE cannot reasonably argue that Mr. Velasco Gomez is a danger to the community or a flight risk. On May 25, 2023, USCIS/Vermont Service Center issued a determination that Mr. Velasco Gomez's I-918 Petition was *bona fide*. On November 14, 2024, DHS issued a Bona Fide Employment Authorization Document ("BFD EAD") to Mr. Velasco Gomez, thereby granting deferred action, and deferring his deportation to Mexico, while he awaits a U visa to become available under the statutory cap. By granting Mr. Velasco Gomez deferred action and BFD EAD, DHS/USCIS has not only already determined that his petition for U nonimmigrant status is bona fide, but the Agency has also reviewed and conducted background checks, and determined that he poses no risk to national security or public safety, and considered other relevant discretionary factors, and decided to exercise favorable discretion, to place him on

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the waitlist and to stay his removal. 3 USCIS-PM C.5(C)(1); *see also* 8 U.S.C. § 1182(a)(3). Furthermore, the existence of a prior removal order is not a bar to either a U visa or a BFD grant, as DHS/USCIS must first consider all inadmissibility grounds, including prior removal orders and re-entries, in making its BFD determination. *See* 6 USCIS-PM B; 3 USCIS-PM C.

As DHS has already agreed to defer Mr. Velasco Gomez's removal and that agreement has not been lawfully terminated, the government can provide no lawful justification for his arrest and detention, and their attempt to execute his reinstated removal order is also unlawful. There is no statutory basis for Mr. Velasco Gomez's current detention and his current detention serves no valid regulatory purpose.

(B) Mr. Velasco Gomez's Grant of Deferred Action Is A Stay of Removal For All Prior Orders and Their Reinstatements.

If DHS/USCIS grants the U petitioner a BFD EAD, DHS/USCIS has then also exercised its discretion to grant him deferred action and for his removal (deportation) to be stayed for the period of the BFD EAD. 3 USCIS-PM C.5. Mr. Velasco Gomez has been granted "deferred action," which serves as an administrative stay of removal, deferring his removal until it is revoked under the procedures set forth in the applicable regulations. 3 USCIS-PM C.5; *see also* 8 U.S.C. § 1182(a)(3); 8 C.F.R. § 214.14(c)(2); 8 C.F.R. § 274a.14(b)(1)-(2).

1) <u>The Execution of Reinstated Removal Orders Is Stayed By A Grant of Deferred Action for Bona Fide U Applicants and Reinstated Orders Are Cancelled By Operation of Law for U Nonimmigrants.</u>

Mr. Velasco Gomez does not challenge his 1991 deportation order or its 2024 reinstatement, rather his detention by Defendants and their attempt to execute that reinstatement in light of Defendant DHS's unrevoked grant of deferred action and agreement to defer his removal. While the government is correct, in that the filing of a U visa petition "has no effect on

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ICE's authority to execute a final order . . .," the grant of deferred action does. 8 C.F.R. § 214.14(c)(1)(ii). Gov't Return, at 7. Not does Mr. Velasco Gomez argue that a stay of removal "terminates" the underlying removal order or its reinstatement (*id.*); he argues that the government has granted him deferred action and thereby *agreed to stay* the execution of his reinstated removal and should be held to its agreement.

While Velasco Gomez may need to reopen and terminate his 1991 deportation order, the regulations governing U nonimmigrant status provide that orders of exclusion, deportation, or removal issued by DHS will be "deemed canceled by operation of law as of the date of USCIS' approval of Form I-918 [petition for U nonimmigrant status]." 8 C.F.R. § 214.14(c)(5)(i), (f)(6). Removal orders issued by DHS include reinstatement orders, expedited removal orders under INA § 235(b), administrative removal orders under INA § 238(b), and orders against Visa Waiver Program entrants under INA § 217(b). Thus, USCIS' approval of a U visa petition automatically cancels a reinstatement order. Likewise, deferred action for a bona fide U visa petitioner who qualifies for U nonimmigrant status but who is simply awaiting a U visa under the statutory cap, would stay his removal regardless of whether his removal has been reinstated.

2) <u>While "Deferred Action" and "Stay of Removal" Are Not Synonymous, They Both Stay One's Removal.</u>

The government is incorrect in its assertion that "USCIS has not revoked the grant of deferred action or BFD employment action is separate and apart from ICE's authority to execute a final order of removal." Gov't Return at 7. One can be granted a "stay of removal" and not deferred action, but one can't be granted deferred action without one's removal being stayed. A stay of removal temporarily suspends a removal order, allowing an individual to remain in the U.S. while pursuing other legal options or awaiting a decision on their case, while deferred

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action is a form of prosecutorial discretion that allows an individual to remain in the U.S. for a specified period without being removed. Per USCIS.gov,

> "Deferred action is a discretionary determination to defer removal of an individual as an act of prosecutorial discretion. For purposes of future inadmissibility based on prior periods of unlawful presence in the United States, an individual is not considered to be unlawfully present during the period when deferred action is in effect. An individual who has received deferred action is authorized by DHS to be in the United States for the duration of the deferred action period. Deferred action recipients are also considered to be lawfully present as described in 8 C.F.R. § 1.3(a)(4)(vi) for purposes of eligibility for certain public benefits (such as certain Social Security benefits) during the period of deferred action."

As briefed in Petitioner's APA complaint, under DHS regulations and policy, "deferred action" is "an act of administrative convenience to the government which gives some cases lower priority," and serves as a form of prosecutorial and enforcement discretion to defer removal (deportation) against a noncitizen for a certain period of time. *See* 8 C.F.R. § 274a.12(c)(14); *see also* 1 USCIS-PM H.2(A)(4); AFM 40.9.2(b)(3)(J) (PDF, 1017.74 KB); *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483–84 (1999). If DHS/USCIS grants the U petitioner a BFD EAD, DHS/USCIS has then also exercised its discretion to grant him deferred action and for his removal (deportation) to be stayed for the period of the BFD EAD. 3 USCIS-PM C.5. The next adjudicative step for these petitioners is final adjudication of the I-918 Petition when space is available under the statutory cap. *Id.* During the time a petitioner for U nonimmigrant status who

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was granted deferred action or parole is on the waiting list, no accrual of unlawful presence under section 212(a)(9)(B) of the INA, 8 U.S.C. § 1182(a)(9)(B), will result. 8 C.F.R. § 214.14(d)(3); *see also, e.g.,* 8 C.F.R. § 1.3(a)(4)(vi) (noncitizens currently in deferred action status are lawfully present aliens for purposes of applying for Social Security benefits); 45 C.F.R. § 155.20 (for purposes of public benefits, noncitizens "granted deferred action" are "lawfully present," "including but not limited to individuals granted deferred action under 8 C.F.R. § 236.22). *But see* 6 C.F.R. § 37.3 (6 C.F.R. governs DHS with respect to Domestic Security: Lawful status," defined, "a person... who has approved deferred action status.")

A petitioner for U nonimmigrant status may be removed from the waiting list and a prior grant of deferred action terminated at the discretion of DHS/USCIS; however, DHS/USCIS is bound by the regulations governing the revocation of employment authorization because they are inextricably linked, deferred action commences upon the grant of a BFD EAD and ends upon its revocation (or expiration). *See* 3 USCIS-PM C.6(B); *see also* 8 C.F.R. § 274a.14(b)(1) (The "Employment authorization granted under § 274a.12(c) may be revoked by the District Director ... [p]rior to the expiration date, when it appears that any condition upon which it was granted has not been met or no longer exists, or for good cause shown; or [u]pon a showing that the information contained in the application is not true and correct.") The noncitizen must be provided with written notification of the intent to revoke the employment authorization and of the reasons revocation is warranted. and given 15 days to respond. 8 C.F.R. § 274a.14(b)(2).

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Respondents' decision to *per se* revoke Petitioner's grant of deferred action by detaining him and seeking to execute his removal to Mexico, without "good cause shown," notice and opportunity to respond as required by the applicable regulations was arbitrary and capricious decision. In so doing, Defendants also violated Plaintiff's right to due process under the law. Respondents have agreed to defer his removal and they should be held to that agreement.

CONCLUSION

For the foregoing reasons, the Government's Motion to Dismiss should be denied.

Dated: May 16, 2025

/s/ Minda A. Thorward

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I certify that this reponse contains 3976 words in compliance with Local Civil Rules.

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District Court Judge James L. Robart
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CARLOS VELASCO GOMEZ,
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Case. No. 2:25-cv-522-JLR-BAT

Agency No. [redacted]

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

[PROPOSED]

The Court, having reviewed the pleadings and materials in this case, it is hereby

ORDERED that:

Federal Respondents' Motion to Dismiss is DENIED.

Dated this _____day of _____, 2025.

JAMES L. ROBART
United States District Judge

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Recommended for entry this _____of _____, 2025.

_____
BRIAN A. TSUCHIDA
United States Magistrate Judge

Presented by:

/s/ Minda A. Thorward

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CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2025, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically filed Notices of Electronic Filing.

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