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 PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION TO PETITIONER'S MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Mr. Velasco Gomez, through counsel, hereby replies to the Government's Opposition to his Motion for Preliminary Injunction. The government seeks to unlawfully remove Mr. Velasco Gomez and has unlawfully detained him for that purpose, A preliminary injunction is necessary in order to end the ongoing injury as quickly as possible.

Citing 8 C.F.R. § 274a.12(c)(14), the government argues that "deferred action" is an act of administrative convenience that gives some cases lower priority for removal but does not actually stay removal. *Resp. Opp. at 1.* Section 274a.12 of Chapter 8, of the Code of Federal Regulations, however, deals only with "Classes of aliens authorized to accept employment." *Id.* This is a

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disingenuous definition of "deferred action," which is in fact, by the government's own policies and regulations, defined as "the discretionary determination *to defer removal* of an individual as an act of prosecutorial discretion." *See* https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions; *see also* 8 C.F.R. § 236.21, which reads in relevant part:

> "Deferred action is an exercise of the Secretary's broad authority to establish national immigration enforcement policies and priorities under 6 U.S.C. 202(5) and section 103 of the Act. *It is a form of enforcement discretion not to pursue the removal of certain aliens for a limited period* in the interest of ordering enforcement priorities in light of limitations on available resources, taking into account humanitarian considerations and administrative convenience." *Id* (*emphasis added*).

Furthermore, under the applicable regulations, noncitizens in "deferred action" status are considered to be lawfully present as described in 8 C.F.R. sec. 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. A grant of deferred action by the government is decision by the government *not to pursue removal... for a limited period*, in this case, while Mr. Velasco Gomez is waiting for a U visa under the statutory cap. There is no misunderstanding on the part of the petitioner, only bad faith actions by the government defendants who seeks to remove Mr. Velasco Gomez unlawfully. *Resp. Opp. at 2.* Nor does the Petitioner "conflate[]his BFD determination with a waiting list decision." *Id. at fn. 2.* A Petitioner who has filed a bona fide petition for U nonimmigrant status *while awaiting* a visa under the statutory cap will either be granted deferred action and a BFD EAD, or will be placed on the "waiting list" without deferred action and a BFD EAD; in either case, the next step is final adjudication once a visa becomes available. *See* USCIS Policy Manual, Vol. 3, Part C, Ch. 5-6, *available at* https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-5 (last visited on May 22, 2025).

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ARGUMENT

A. The Court Has Jurisdiction to Stay Petitioner's Removal and To Review Whether The Government Can Execute A Removal It Has Agreed to Defer.

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. Here, government is failing to follow its own regulations. Mr. Velasco Gomez has not asked this court to review his reinstated removal order, nor is he seeking review of the denial of ICE's denial of his I-246 stay request.

As argued in Petitioner's opposition to Respondent's motion to dismiss, the Ninth Circuit in *U.S. v. Hovsepian*, 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

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> 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:

> 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]

[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

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"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.* 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

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(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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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, which under the applicable regulations, means that his removal has been deferred *while he awaits a final adjudication of his U visa. See* 8 C.F.R. § 236.21. The government's grant of deferred action should have the same legal force and effect regardless of who sits in the oval office, such that Mr. Velasco Gomez cannot be removed in contraversion of that grant, unless the proper regulatory processes are followed. *See* 3 USCIS-PM C.6(B); *see also* 8 C.F.R. § 274a.14(b)(1)-(2). Thus, 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 his motion for preliminary injunction should be granted.

1. 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").

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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, *in that his removal has been deferred until his U vis ais adjudicated,* 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 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 his motion for preliminary injunction should be granted.

2. Release from Detention

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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 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

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> 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 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

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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 Is Likely to Succeed On the Merits.**

A grant of deferred action defers, or stays, a noncitizen's removal for all prior orders and their reinstatements for a specific period of time. 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 his petition for U nonimmigrant status is adjudicated or 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 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

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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) While "Deferred Action" and "Stay of Removal" Are Not Synonymous, They Both Stay One's Removal for Specific Periods of Time.

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. When one's removal is "deferred" it is stayed, temporarily, for a set period of time. *See* 8 C.F.R. § 236.21.

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

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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 was granted deferred action or parole is on the waiting list (or waiting for a U visa under the statutory cap), 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/or 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

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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).

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 Petitioner's right to due process under the law, and he is unlawfully detained. "Civil commitment for any purpose constitutes a significant deprivation of liberty." *Singh v. Holder,* 638 F.3d 1196, 1204 (9th Cir. 2011). Respondents have agreed to defer his removal, and they should be held to that agreement.

CONCLUSION

Mr. Velasco Gomez's motion for preliminary injunction should be granted.

Dated: May 22, 2025

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I certify that this reply contains 4020 words in compliance with Local Civil Rules.

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CERTIFICATE OF SERVICE

I hereby certify that on May 23, 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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UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CARLOS VELASCO GOMEZ, Petitioner, v. BRUCE SCOTT, *et al.*, Respondents.	Case No. 2:25-cv-522-JLR-BAT FEDERAL RESPONDENTS' REPLY IN SUPPORT OF THE MOTION TO DISMISS Noted for Consideration: May 23, 2025

I. INTRODUCTION

This Court should grant Federal Respondents' Return and Motion to Dismiss (Dkt. No. 4 "Motion" or "Mot.") Petitioner Carlos Velasco Gomez's Petition for Writ of Habeas Corpus. Dkt. No. 1 ("Pet.").[1] U.S. Immigration and Customs Enforcement's ("ICE") detention and execution of his valid removal order is lawful despite U.S. Citizenship and Immigration Services' ("USCIS") grant of deferred action and employment authorization pursuant to the bona

[1] Velasco Gomez has recently filed a motion to consolidate (Dkt. No. 13) this case with a separate complaint that raises an Administrative Procedure Act ("APA") challenge to Department of Homeland Security's ("DHS") purported "decision to per se revoke" the grant of deferred action by detaining him and seeking to execute his removal to Mexico. *Velasco Gomez v. Noem*, No. 2:25-cv-783-GJL, Compl., ¶ 1. While Federal Respondents take no position on the motion to consolidate, Federal Respondents ask that this Court dismiss Velasco Gomez's habeas claim based on this motion to dismiss, as it is a separate review of the constitutionality of Velasco Gomez's detention under 28 U.S.C. § 2241. Thus, consolidation should not moot this motion to dismiss the habeas claim.

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fide determination ("BFD") process for U nonimmigrant petitioners. Pet., ¶¶ 55-58. The filing of a U visa petition "has no effect on ICE's authority to execute a final order . . .." 8 C.F.R. § 214.14(c)(1)(ii). Velasco Gomez wrongly claims that his removal order has already been stayed because of his deferred action. Dkt. No. 12, Resp. to Mot. ("Opp."), at 5. However, this Court lacks jurisdiction to review ICE's discretionary determination to execute his removal order. Mot., at 8-9. Even if this Court were to find that it has jurisdiction to consider whether the grant of deferred action has stayed his removal, this Court should dismiss Velasco Gomez's habeas claim.

Velasco Gomez has provided no statutory or regulatory evidence that BFD deferred action "functions as a stay of removal." Opp., at 1. USCIS's BFD determination neither precludes ICE from executing an outstanding removal order nor confers a stay of removal. *See* 8 C.F.R. §§ 214.14(c)(1)(ii) & (c)(5)(i). Furthermore, Velasco Gomez's claim that he is "lawfully present" conflates two different concepts: the accrual of unlawful presence and a person's lawful status in the United States. *Id.* There is no evidence that Velasco Gomez has lawful status to be in the United States. Therefore, ICE's detention of Velasco Gomez pending his removal to Mexico is lawful pursuant to 8 U.S.C. § 1231(a).

Accordingly, this Court should dismiss Velasco Gomez's habeas claim.

II. ARGUMENT

DEFERRED ACTION GRANTED THROUGH THE BFD PROCESS DOES NOT STAY EXECUTION OF A VALID REMOVAL ORDER.

Velasco Gomez incorrectly asserts that DHS stayed his removal when USCIS granted him deferred action through the U visa BFD process. Opp., at 9-13. A grant of BFD deferred action is not synonymous with a stay of removal. *See Raghav v. Jaddou*, No. 2:25-cv-00408, 2025 WL 373638, at *2 (E.D. Cal. Feb. 3, 2025) ("Plaintiff obtaining a BFD in his favor would

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not prevent his removal"); *see also* "New Classification for Victims of Criminal Activity; Eligibility for 'U' Nonimmigrant Status," 72 Fed. Reg. 53014, 53016 n.3 (Sept. 17, 2007) (defining "deferred action" and "a stay of deportation or removal" separately and distinctly in the U visa context); 8 U.S.C. § 1227(d)(2) (listing deferred action and a stay of removal as distinct benefits). Deferred action is an act of administrative convenience that gives some cases lower priority for removal. 8 C.F.R. § 274a.12(c)(14). While Velasco Gomez asks this Court to infer such a stay based on various regulatory and policy provisions, there is no language in the statute or regulations that state that a grant of deferred action through the U visa BFD process stays removal. Indeed, USCIS's Policy Manual indicates otherwise, noting that the granting of a BFD EAD establishes a prima facie case for approval such that ICE can consider granting a discretionary stay of removal per 8 U.S.C. § 1227(d)(1). USCIS Policy Manual, Vol. 3, Part C, Ch.5, available at: https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-5 (last visited May 23, 2025). If a grant of deferred action through the U BFD process constituted a stay of removal, this guidance would be superfluous.

In comparison, the regulations related to T visas contain the specific language lacking here. Like with U visa petitions, "[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 applicant may request an administrative stay of removal" pursuant to 8 CFR 241.6(a). 8 C.F.R. § 214.204(b)(2)(ii). But unlike the U visa regulations, a bona fide determination on a T visa application automatically stays removal, "and the stay will remain in effect until a final decision is made on the Application for T Nonimmigrant Status." *Id.*, § 214.204(b)(2)(iii). This demonstrates that specific language could have and would have been included in the U visa regulations if the BFD process, including a grant of deferred action, stayed removal. *See* generally 8 C.F.R. § 214.14.

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Velasco Gomez fails to include any direct legal support for his proposition that deferred action is DHS's agreement to stay removal. Instead, he relies on unsupported assertions based on inferences. *See* Opp., at 10-11 (stating, without support, "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."); *id.* (stating, without support, "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."). He further provides a purported quote from "USCIS.gov" without providing any information or context for the quote. Opp., at 11. He also cites to a non-relevant volume and section of the USCIS Policy Manual concerning "Emergencies or Unforeseen Circumstances." Opp., at 11 (citing 1 USCIS-PM H.2(A)(4)). This is in a separate volume of the policy manual from the volume and chapter relating to U visas. *See* USCIS Policy Manual, Vol. 3, Part C, *available at* https://www.uscis.gov/policy-manual/volume-3-part-c (last visited May 22, 2025). In the same fashion, he cites to the Adjudicator's Field Manual, which has been retired. *Id.* (stating that the Adjudicator's Field Manual was retired in May 2020); Opp., at 11 (citing AFM 40.9.2(b)(3)(J)). Finally, Velasco Gomez cannot rely on a treatise cited by the Supreme Court in 1999. *Id.* (citing *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 (1999)). This treatise was written prior to the creation of the U nonimmigrant classification in 2000 and well before the BFD policy in 2021. *See* 6 C. Gordon, S. Mailman, & S. Yale–Loehr, Immigration Law and Procedure § 72.03 [2][h] (1998).

Furthermore, ICE has explicitly denied Velasco Gomez's request for an administrative stay of his removal. ICE reviewed Velasco Gomez's application for an administrative stay in accordance with 8 U.S.C. § 1227(d)(1). Dkt. No. 11, PI Mot., Thorward Decl., Letter; *see also* Dkt. No. 7, TRO, at 4-5. Section 1227(d)(1) provides that the DHS Secretary may grant a

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noncitizen an administrative stay of a final order of removal under 8 U.S.C. § 1231(c)(2). In turn, Section 1231(c)(2) allows for a stay of removal when "(i) immediate removal is not practicable or proper; or (ii) the alien is needed to testify in the prosecution of a person for a violation of a law of the United States or any State." 8 U.S.C. § 1231(c)(2).

After reviewing Velasco Gomez's application and supporting documents, ICE found that the totality of the circumstances does not support a favorable exercise of discretion. PI Mot., Thorward Decl., Letter; *see also Raghav*, 2025 WL 373638, at *2 (citing *Jiminez v. Dep't of Homeland Sec.*, No. 2:22-cv-967, 2022 WL 19410308, at *3 (C.D. Cal. Nov. 14, 2022)). Consistent with the USCIS policy guidance cited above, Federal Respondents do not dispute this Court's statement that the BFD EAD grant fulfills DHS's prima facie review of Velasco Gomez's Form I-918 under 8 U.S.C. § 1227(d)(1). Dkt. No. 7, TRO, at 4-5. To the extent that Velasco Gomez is seeking judicial review of ICE's discretionary denial of his application for an administrative stay of removal after this prima facie determination, this Court lacks subject matter jurisdiction under the APA. 8 U.S.C. § 1252(a)(2)(B)(ii).

To further dispute ICE's lawful ability to execute his removal order, Velasco Gomez asserts that he is "lawfully present" in the United States. Opp., at 1. He is correct that he is not currently accruing unlawful presence because of his grant of deferred action. *See* 8 C.F.R. § 214.14(d)(3). However, his assertion conflates the distinction between "unlawful status" and "unlawful presence." While the concepts of being in unlawful immigration status and the accrual of unlawful presence ("period of stay not authorized") are related, they are not the same. *See* 8 U.S.C. §§ 1182(a)(9)(B) & (a)(9)(C)(i)(I). For instance, a person must be present in an unlawful status to accrue unlawful presence. In contrast, a person may not have lawful status to remain in the United States but not accrue unlawful presence while his U visa application is pending. 8 C.F.R. § 214.14(d)(3). But deferred action does not provide a noncitizen with legal

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status to be in the United States. This distinction is supported by Velasco Gomez's citations to regulations treating people with deferred action as having lawful status for specific purposes. Opp., at 11-12. These regulations demonstrate that deferred action does not provide lawful status for all purposes. And even if deferred action constituted "lawful status," no authority indicates it would nullify his removal order, and individuals in lawful status can be and are subject to removal in certain circumstances. 8 U.S.C. § 1227(a) ("Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens.").

Finally, Velasco Gomez's argument that his detention and removal violate the APA as a *per se* revocation of his deferred action or EAD lacks merit. Opp., at 12-13. Velasco Gomez cites no authority stating that revocation of employment authorization and/or termination of deferred action are prerequisites to detention or removal. Even if they were, Velasco Gomez cannot rely on 8 C.F.R. § 274a.14 to support his argument. *Id.*, at 12. He cites to subsection (b), which deals with the revocation of employment authorization. But employment authorization revocation procedures provided in the regulation do not cabin the Secretary's "absolute discretion" to terminate deferred action and prioritize Velasco Gomez's removal. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

Accordingly, ICE's detention and execution of Velasco Gomez's removal order is lawful and his habeas claim should be dismissed.

III. CONCLUSION

For the foregoing reasons, this Court should grant Federal Respondents' motion to dismiss.

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Respectfully submitted,

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I certify that this memorandum contains 1,681 words, in compliance with the Local Civil Rules