UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

LARYSA KOSTAK,
Petitioner,

v.

DONALD J. TRUMP, et al.

Respondents.

Civil Action No. 3:25-cv-1093

Judge Jerry Edwards Jr.

PETITIONER'S REPLY

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INTRODUCTION

Having crafted an untenable interpretation of this nation's immigration laws that flies in the face of the statutory text—in particular, Section 1225(b)(2)[1]—and the United States Constitution, Respondents now argue that this Court can do nothing to correct their unconstitutional actions. The government is wrong. *See I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1044-45 (1984).

Contrary to Respondents' argument, this Court has jurisdiction to grant Petitioner's requested relief. *See, e.g., Jennings v. Rodriguez,* 583 U.S. 281, 295 n.3 (2018) ("The question [as to jurisdiction] is not whether detention is an action taken to remove an alien but whether the legal questions in this case arise from such an action."). This case has nothing to do with whether Respondents can commence removal proceedings against Larysa. ECF No. 1 at ¶ 37. Indeed, Larysa's detention was wholly untethered to that commencement, which occurred years prior—rendering the case law on which Respondents rely inapt to the case at bar.

The legal question at issue here is whether Respondents' unnoticed detention of Petitioner and her continued mandatory detention pursuant to Section 1225(b) is lawful. Numerous sister courts have considered this question and concluded not only that federal courts have jurisdiction to answer this very question, but that the question itself must be answered in the negative. This issue does not fall within the proscriptions of Section 1252(g), (b)(9), or (a)(5). *See* Order Granting Petitioners' Ex Parte Application for Temporary Restraining Order and Order to Show Cause, *Bautista et al. v. Santacruz Jr. et al.,* Case No 5:25-cv-1873 at 4-6 (C.D. Cal. Jul. 28, 2025); *see also* Order Granting Ex Parte Application for Temporary Restraining Order and Order to Show Cause, *Gonzalez v. Noem*, Case No. 5:25-cv-20254 at 3-6 (C.D. Cal. Aug. 13, 2025); *Vasquez*

[1] All short cites in this brief follow the conventions identified in Petitioner's habeas petition. *See* ECF No. 1.

Perdomo v. Noem, No. 2:25-CV-05605-MEMF-SP, 2025 WL 1915964, at *17 (C.D. Cal. July 11, 2025); *Michalski v. Decker*, 279 F. Supp. 3d 487, 495 (S.D.N.Y. 2018); *Mahdawi v. Trump*, 136 F.4th 443, 450 (2d Cir. 2025) (similar); *Mahdawi v. Trump*, 781 F. Supp. 3d 214 (D. Vt. 2025) (similar). As such, Larysa's TRO is viable.

Respondents' further arguments that Larysa fails to meet the TRO standard ring hollow. Their argument that application of the mandatory detention statute does not conflict with the statutory text is premised on an implausible claim that an irreconcilable conflict exists between Sections 1226(a) and 1225(b). But the case law has never recognized such a conflict. *See Jennings*, 583 U.S. 281 at 288-89 (2018) (finding that Sections 1225 and 1226 are complimentary); *see also Benitez v. Francis et al.*, 2025 WL 2267803, slip op. at 8 (S.D.N.Y. Aug. 8, 2025) (applying *Jennings*). Equally unavailing is Respondents' argument that Larysa can only seek relief for her constitutional claims from the BIA. *See, e.g.*, *Mandarino v. Ashcroft*, 318 F. Supp. 2d 13, 16 (D. Conn. 2003) (*citing Rabiu v. INS*, 41 F.3d 879, 882 (2d Cir. 1994) ("BIA does not have jurisdiction to address constitutional claims.").

Additionally, Respondents' claim that no irreparable harm exists when an individual's constitutional rights are violated is unsupported. *See, e.g.*, *Balza v. Barr*, No. 6:20-CV-00866, 2020 WL 6143643, at *6 (W.D. La. Sept. 17, 2020*), report and recommendation adopted,* No. 6:20-CV-00866, 2020 WL 6064881 (W.D. La. Oct. 14, 2020). This is particularly the case where, as here, Larysa is neither a flight risk, nor a danger to the community—demonstrating that the public interest and balance of equities favor granting her TRO. *See Ozturk v. Trump, et al.*, 2025 WL 1420540 at *5-6 (D. Vt. May 16, 2025).

ARGUMENT

I. Respondents Wrongly Claim This Court Lacks Jurisdiction Over This Case.

Respondents invoke Section 1252(g), (b)(9), and (a)(5) as reasons why this Court cannot

entertain this petition. ECF No. 18 at 7-10. Each provision cited falls flat as to the ambit of this petition, which does not seek in any way to challenge the removal proceedings brought against Petitioner by Respondents in another forum. *See Mahdawi v. Trump*, 136 F.4th 443, 449-453 (2d Cir. 2025) (holding that Sections 1252(g), (b)(9), or (5) do not affect jurisdiction over challenges to unlawful detention).

A. Section 1252(g) Does Not Bar Jurisdiction.

Over two decades ago, the Supreme Court held that the jurisdiction-stripping provision Section 1252(g) "applies only to three discrete actions"—a decision "to 'commence proceedings, adjudicate cases, or execute removal orders.'" *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999). Contrary to Respondents' articulated position that Larysa's detention arises from the commencement of her removal proceedings, Section 1252(g) does not explicitly strip federal courts of jurisdiction over challenges to detention. ECF No. 18 at 2, 8. Respondent's contention that detention is somehow necessarily tethered to the commencement of removal proceedings "dramatically overstates the reach of § 1252(g)." *Mahdawi*, 136 F.4th at 450 (making this statement in relation to Respondents argument that petitioner's "unlawful detention 'aris[es] from' the commencement of removal proceedings").

Crucially, as is the case here, Section 1252(g) does not strip federal courts from considering constitutional questions about detention that fall short of the execution of a removal order—which all parties agree is *not* at issue here. *See Kong v. United States,* 62 F.4th 608, 614 (1st Cir. 2023) ("Among such 'collateral' claims" not subject to the § 1252(g) bar on judicial review are "claims seeking review of the legality of a petitioner's detention"); *Ozturk v. Hyde*, 136 F.4th 382, 397 (2d Cir. 2025) (finding an unlawful detention challenge to be wholly unrelated to the jurisdiction-stripping provisions of Section 1252(g)).

Respondents erroneously cite to a series of cases, none which are appropriate here. *See,*

e.g., *Tazu v. Att'y Gen. United States*, 975 F.3d 292, 294-298 (3d Cir. 2020) (holding that detention was tied to a final order of removal, which is not at issue here); *Alvarez v. ICE*, 818 F.3d 1194, 1196, 1203-05 (11th Cir. 2016) (holding 1252(g) strips jurisdiction over the decision to commence removal and detain a lawful permanent resident premised on guilty plea to federal weapons charges); *id.* (equally holding that 1252(g) did not bar court from deciding detention claim, which alleged that "the agency had no statutory grounds on which to detain him" not barred by 1252(g)).[2]

The jurisdictional bars that form part of 1252(g) are not "infinitely elastic." *Kong*, 62 F.4th at 614 (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); *Michalski,* 279 F. Supp. 3d at 495 (finding none of 1252(g)'s "discrete actions are implicated by [petitioner's] challenge to his detention"). Indeed, "there are "'many other decisions or actions that may be part of the deportation process' but that do not fall within the three discrete exercises of 'prosecutorial discretion' covered by § 1252(g)." *Ozturk*, 136 F.4th at 397 (quoting *AADC*, 525 U.S. at 482). Habeas relief from an unconstitutional detention does not implicate Respondents' ability to initiate removal proceedings (already in progress here prior to Larysa's detention) or execute a removal

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[2] Sister courts have spoken recently and consistently that 1252(g) does not strip federal courts of jurisdiction in answering the question at bar. *See Bautista,* Case No 5:25-cv-1873 at 4-6 (C.D. Cal. Jul. 28, 2025); *see also Gonzalez,* Case No. 5:25-cv-20254 at 3-6 (C.D. Cal. Aug. 13, 2025); *Vasquez Perdomo,* 2025 WL 1915964 at *17. At bottom, the cases that Respondents cite are not applicable to the challenge that Larysa brings here. *Valencia-Mejia v. United States*, 2008 WL 4286979, at *1 (C.D. Cal. Sept. 15, 2008), a Federal Tort Claims Act ("FTCA") and *Bivens* case, did not seek habeas relief and, in any event, its 1252(g) holding is inapt to the case at bar. There, the FTCA/*Bivens* claims derived precisely from the commencement of proceedings—which is not the case here, where Larysa's removal proceedings commenced years prior to her detention, which in turn was unlawful because it was prompted based on both an unconstitutional ruse and an unconstitutional reading of the mandatory detention statute. *Id.* at *4 (finding that because detention was directly tied to the denial of petitioner's voluntary departure removal request and the commencement of removal proceedings, 1252(g) barred consideration of the FTCA/*Bivens* claims). Respondents' remaining non-habeas case law suffers the same fate. *See Herrera-Correra v. United States,* No. CV 08-2941 DSF (JCx), 2008 WL 11336833, at *3 (C.D. Cal. Sept. 11, 2008) (holding 1252(g) barred jurisdiction in FTCA case because the claims originated from the decision to commence immigration proceedings); *Wang v. United States*, No. CV 10-0389 SVW (RCX), 2010 WL 11463156, at *6 (C.D. Cal. Aug. 18, 2010) (same).

order. *Mahdawi*, 136 F.4th at 450; *see also AADC*, 525 U.S. at 485 n.9. As such, there is no 1252(g) jurisdictional bar at issue in this case.

B. Section 1252(b)(9) Does Not Bar Jurisdiction.

Respondents cite to Section 1252(b)(9), which concerns review of a final order of removal, also fails. ECF No. 18 at 9. Significantly and dispositively, there is no final order of removal at issue here. Section "1252(b)(9) does not present a jurisdictional bar where those bringing suit are not asking for review of an order of removal, the decision to seek removal, or the process by which removability will be determined." *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 591 U.S. 1, 19 (2020) (cleaned up). The Supreme Court rejected their "expansive interpretation" of Section 1252(b)(9). *Jennings*, 583 U.S. at 293. Because Larysa's "unlawful detention claims may be resolved without affecting [her] pending removal proceedings," this Court has jurisdiction to adjudicate her habeas petition and this TRO. *Mahdawi*, 136 F.4th at 452.

C. Section 1252(a)(5) Does Not Bar Jurisdiction.

Respondents argue that Section 1252(a)(5) requires that a "petition for . . . shall be the sole and exclusive means for judicial review of an order of removal [.]" ECF No. 18 at 9. But, for the same reasons that Respondents Section 1252(b)(9) fails, so too does its (a)(5) argument—there is no final order of removal at issue and 1252(a)(5) cannot be invoked. *Mahdawi v. Trump*, 781 F. Supp. 3d 214 (D. Vt. 2025); *Ozturk v. Hyde*, 136 F.4th 382, 401 (2d Cir. 2025) (finding that Section 1252(a)(5) does not strip jurisdiction of habeas challenges to unlawful detention for the same reasons that Section 1252(b)(9) does not). Respondents' own statutory citation belies this truth and, accordingly, the fact that this Court has jurisdiction over Larysa's petition and her TRO.

II. Larysa Is Likely To Prevail on the Merits of Her Constitutional Claims.

A. Larysa Is Likely to Prevail on her Procedural Due Process Claim.

Larysa is not subject to expedited removal under the plain text of the expedited removal

law—a fact that has been borne out by her upcoming asylum merit hearing on October 27, 2025. ECF No. 9-1 at 7. Respondents' contrary contention relies on an invocation unsupported by law or fact that Sections 1226(a) and (b)(5) exist in "irreconcilable conflict" with one another. ECF No. 18 at 12. Since courts for years have had no trouble reconciling the two Sections, claiming such a conflict goes against the grain of all case law on the issue to date. *See*, e.g., *Jennings*, 583 U.S. at 289, 303 (explaining that Section 1226 "applies to aliens already present in the United States,"— like Larysa); *Benitez*, 2025 WL 2267803 slip op. at 8 (noting court could not "identify any authority" supporting Respondents' interpretation of Section 1225(b)); *Martinez v. Hyde*, --- F.Supp.3d ---, 2025 WL 2084238 at *8 (D. Mass. July 24, 2025) (similar); *see also Arrazola-Gonzalez et al. v. Noem et al.*, 2025 WL 2379285, slip op. at 2 (C.D. Cal. Aug. 15, 2025) (similar); Order Granting Ex Parte Application for TRO and Order to Show Cause, *Gonzalez v. Noem*, Case No. 5:25-cv-2054 (C.D. Cal. Aug. 13, 2025) (similar).

Respondents further incorrectly assert that Section 1225(b)(2) "serves as a catchall provision" that applies to all those who EWI, no matter how long they have resided in the country. ECF No. 18 at 5, 11. But Respondents admit that Section 1226(a) was designed for individuals who were "'arrested and detained pending a decision' on removal." ECF No. 18 at 12. This is exactly what happened to Larysa; the text of the law on which Respondents rely defeats the very argument that Larysa is somehow subject to Section 1225(b). *See* ECF No. 9-1 at 11 (Opening Release Mot. Br., collecting cases). Larysa plainly falls within the parameters of Section 1226(a). *See* ECF No. 1, Pet. at ¶ 45-60, 66-67, 70, 89; *see also* ECF No. 9-1 (Opening Release Mot. Br.) at 10-12; ECF No. 16 at 4 (explaining and citing cases showing that recent amendment to Section 1226 makes no logical sense if Respondents' interpretation is correct). There is simply no support for Respondents' position on Section 1225(b), demonstrating that Larysa is likely to prevail on her

statutory and procedural due process claim.[3]

B. Larysa Is Likely to Prevail on her Substantive Due Process Claim.

As to Larysa's substantive due process claim, Respondents have not meaningfully responded, thereby waiving any argument that Larysa likely fails to succeed on this claim. *United States v. Reagan*, 596 F.3d 251, 254-55 (5th Cir. 2010) (a party's failure to offer any "arguments or explanation . . . is a failure to brief and constitutes waiver"); *Magee v. Life Ins. Co. of N. Am.*, 261 F. Supp. 2d 738, 748 n. 10 (S.D. Tex. 2003) ("failure to brief an argument in the district court waives that argument in that court"). Because Respondents' actions violate the plain reading of the statute, her incarceration unquestionably violates her liberty interest. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects."); *Reno v. Flores*, 507 U.S. 292, 306 (1993) (similar).

C. Larysa is Likely to Prevail on her Fourth Amendment Claim.

Larysa is also likely to prevail on her Fourth Amendment claim. Respondents' reliance on *United States v. Allibhai*, 939 F.2d 244, 247 (5th Cir. 1991) founders here, just as it did in opposing Larysa's release motion. ECF No. 18 at 12; ECF No. 15 at 7 (distinguishing case, noting that it concerned an unsuccessful, post-conviction challenge to a "sting operation" involving a money-laundering investigation, which has no remote bearing on this case). Respondents effectively argue that coordinating the surprise arrests of immigrants absent exigent circumstances at immigration court does not qualify as an unconstitutional ruse because ICE and DOJ are distinct entities. ECF No. 18 at 15. But that contention falls flat because it was ICE and DOJ together that decided on a newfound interpretation of Section 1225(b) and, accordingly, engaged in coordinated widespread

[3] As explained in her Reply to Respondents' opposition to her Motion for Release, courts around the country have emphatically rejected Respondents' interpretation. ECF No. 16 (collecting cases).

arrests of immigrants at their immigration court proceedings at 26 Federal Plaza. *See* ECF No. 16 at 6; Pet. ¶¶ 10-13, 41 (citing news articles and cases substantiating this allegation); ECF No. 9-2 (guidance); Op. Br. at 13-14.[4] Larysa is accordingly likely to prevail on her unlawful ruse claim.

D. Exhaustion Is Not Required.

Respondents argue that the habeas petition should be dismissed because Larysa has not appealed her bond denial to the BIA. They argue that exhaustion can only be excused where review by the BIA would be "inadequate or not efficacious or would be a futile gesture." ECF No. 18 at 15, 18 (internal quotations omitted). Larysa satisfies the very standard Respondents invoke.

Having told this Court to reject prior agency practice in its interpretation of Sections 1225 and 1226, ECF No. 18 at 14, Respondents now aver that agency expertise from the BIA is necessary to determine whether Section 1225 or Section 1226 applies; they further claim that Larysa's petition would encourage "the deliberate bypass[ing] of the administrative scheme." ECF No. 18 at 15. This argument has failed in other courts. Order in *Bautista*, Case No. 5:25-cv-01873 at 11 (Jul. 28, 2025)(rejecting this argument). Moreover, the BIA follows the guidance of DOJ (as Respondents concede) and the guidance at issue here was issued by DOJ. Pet. at ¶¶ 5, 11-15 (bond denied based on DOJ guidance). Because Larysa's bond application was not denied on the merits, Respondents' continued reliance on *Leonardo v. Crawford*, 646 F.3d 1157, 1160 (9th Cir. 2011), is inapt as any appeal to the BIA would be "a futile gesture." *Id.* Similarly, Respondents' reliance on a case concerning the denial of cancellation of removal based on aggravated felonies is likewise inapt, because there is no disagreement that such matters can be considered by the BIA. *Laing v. Ashcroft*, 370 F.3d 994, 997 (9th Cir. 2004).

At issue here is whether the BIA can consider the constitutional claims raised here. It

[4] These facts can be vetted through discovery, but Larysa has alleged sufficient uncontroverted facts here to show that she is likely to succeed in proving that ICE and EOIR worked in concert with in executing her arrest.

cannot because "neither the IJ nor the BIA has 'jurisdiction to decide constitutional issues." *Ozturk v. Hyde*, 136 F.4th at 400 (quoting *Rabiu v. Immigr. & Naturalization Serv.*, 41 F.3d 879, 882 (2d Cir. 1994)); *see also* 8 U.S.C. § 1252(b)(4)(A) (BIA can only decide matters in the administrative record, which would be insufficient for constitutional claims at issue here). But even if prudential exhaustion was warranted, appealing to the BIA is not "efficacious," *Laing*, 370 F.3d at 1000, because "on average, the BIA takes over six months to issue custody appeal decisions." *See Rodriguez Vazquez*, 2025 WL 1193850, at *9. This timeline contrasts sharply with the federal pre-trial detention system, where the statute "provide[s] for immediate appellate review of the detention decision." *United States v. Salerno*, 481 U.S. 739, 752 (1987).

The BIA's delays, not to mention any attendant delay before the Fifth Circuit, underscore the irreparable injury that would result from requiring exhaustion. *Laing* 370 F.3d at 1001; *see also Hechavarria v. Whitaker*, 358 F. Supp. 3d 227, 237 (W.D.N.Y. 2019).

III. Larysa's Detention Constitutes Irreparable Harm.

Larysa has demonstrated that her unlawful detention—without any statutory authority—constitutes irreparable harm. The Fifth Circuit requires only a "substantial threat" of irreparable injury, *DSC Commc'ns Corp. v. DGI Techs., Inc.*, 81 F.3d 597, 600 (5th Cir.1996); that is, "harm for which there is no adequate remedy at law," unlike, for example, monetary damages. *Daniels Health Scis., L.L.C. v. Vascular Health Scis.*, L.L.C., 710 F.3d 579, 585 (5th Cir. 2013). "[E]ven temporary unconstitutional deprivations of liberty suffice to establish irreparable harm." *Booth v. Galveston Cty.*, 2019 U.S. Dist. LEXIS 133937 at *18 (S.D. Tex. Sep. 11, 2019) (citing *Pugh v. Rainwater*, 483 F.2d 778, 782-83 (5th Cir. 1973)). Respondents' answer to this charge is just to say that acknowledging this type of irreparable harm would trigger a parade of horribles (ECF No. 18 at 17)—in short, preventing them from unconstitutionally detaining others. But all the cases they cite concern individuals denied bond because they were deemed dangers or flight risks—not

because they were deemed statutorily ineligible for the relief sought.[5] Because Larysa is being detained absent any legal basis, she is, without question, experiencing irreparable harm.

IV. Respondents Incorrectly Posit That Governmental Interests Supersede The Public Interest and the Balance of Equities, Which Cut In Larysa's Favor.

Respondents argue that they have a compelling interest in "the steady enforcement of its immigration laws" and in the authority of the BIA. ECF No. 18 at 18-19. But, as Respondents functionally admit, they are the ones (not Larysa) who have interrupted the "steady enforcement of its immigration laws" because they are the ones who are creating a new interpretation of existing immigration law spun out of whole cloth. *See supra* at Part II.A. Respondents cannot create an institutional problem and then claim there is an institutional interest in fixing it by making the problem its own solution. Respondents fail to contend with the fact that the balance of equities clearly fall in Larysa's favor. ECF No. 3-1 at 14 (showing she is neither a flight risk nor a danger); *Mahdawi*, 2025 WL 1243135, at *14 (detention does "not benefit the public in any way" when a petitioner "appears not to be either a flight risk or a danger to the community").

CONCLUSION

Larysa respectfully asks this Court to grant her TRO and enjoin her detention.

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5 *Compare Reyes v. Wolf*, No. C20-0377JLR, 2021 WL 662659, at *3 (W.D. Wash. Feb. 19, 2021), *aff'd sub nom. Diaz Reyes v. Mayorkas*, No. 21-35142, 2021 WL 3082403 (9th Cir. July 21, 2021) (finding no irreparable harm where petitioner was denied bond as a flight risk and danger); *Meneses v. Jennings*, No. 21-CV-07193-JD, 2021 WL 4804293, at *5 (N.D. Cal. Oct. 14, 2021), *abrogated by Doe v. Garland*, 109 F.4th 1188 (9th Cir. 2024)(finding no injury for detention where being found a danger and flight risk, while still noting that there is "no doubt that being detained without due process would be an irreparable harm"); *Bogle v. DuBois*, 236 F. Supp. 3d 820, 823 (S.D.N.Y. 2017) (finding no irreparable injury after being found a flight risk and danger via appropriate IJ processes, which would be subject to BIA review); *Aden v. Nielsen*, No. C18-1441RSL, 2019 WL 5802013, at *3 (W.D. Wash. Nov. 7, 2019) (denying irreparable injury on the facts but noting that "the Court agrees that *constitutionally defective detention* constitutes an irreparable injury")(emphasis added); *Delgado v. Sessions*, No. C17-1031-RSL-JPD, 2017 WL 4776340, at *1 (W.D. Wash. Sept. 15, 2017), report and recommendation adopted, No. C17-1031-RSL, 2017 WL 4700360 (W.D. Wash. Oct. 19, 2017) (exhaustion not waived where the IJ had found flight risk and danger, and the BIA was reviewing the decision).

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Respectfully submitted,

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