

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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DIEGO DE PAZ VELASCO, also known as ERRIK  
HERRERA DELLANOS,

Petitioner,

v.

25-CV-01236-LJV

TAMMY MARICH, in her official capacity as Acting Field  
Office Director, Buffalo Field Office, Enforcement and  
Removal Operations, U.S. Immigration & Customs  
Enforcement, et al.,

Respondents.

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**RESPONDENTS' MEMORANDUM OF LAW IN SUPPORT OF THE MOTION TO  
DISMISS THE PETITION**

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### INTRODUCTION

Petitioner Diego De Paz Velasco is a national of Guatemala who unlawfully entered the United States and was ordered deported. Because obtaining a travel document was initially difficult, the Department of Homeland Security (“DHS”), Immigration and Customs Enforcement (“ICE”) released Velasco on an Order of Supervision. ICE is now working to execute the removal order against him, and he was therefore taken back into ICE custody pursuant to the relevant provisions of the Code of Federal Regulations. The jurisdiction-stripping provisions of the Immigration and Nationality Act (“INA”) deprive this Court of jurisdiction to hear claims challenging Velasco’s removal—including his being taken into detention for purposes of removal—and render the Administrative Procedures Act (“APA”) inapplicable. In addition, none of the provisions of the APA were violated, even assuming all allegations in the Petition, and Velasquez has failed to state a claim upon which relief can be granted. Accordingly, this action should be dismissed in its entirety.

### STATEMENT OF FACTS<sup>1</sup>

Velasco is a native and citizen of the Guatemala who entered the United States unlawfully in 2004. Pet., ECF No. 1 at ¶ 16.

In 2007, Velasco was arrested and an order of removal was entered *in absentia* on August 2, 2007. *Id.*; ECF No. 6 at pg. 2. He is therefore detained pursuant to 8 U.S.C. § 1231 as an alien with a final order of removal.

In August 2024, Velasco was encountered by immigration officials. ECF No. 1 at ¶ 17. He was released on an order of supervision dated August 15, 2024. ECF No. 6 at pg. 2.

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<sup>1</sup> Given the expedited briefing schedule for this matter, the facts here are taken from the Petition and the truth of such facts is not admitted.

At his check-in with ICE on November 12, 2025, Velasco was taken into custody. ECF No. 1 at ¶ 21. Velasco was served with a Notice of Revocation of Release dated November 12, 2025, in which ICE informed him that his case had been reviewed and it was determined that he would be detained. ECF No. 6 at pg. 4. The Notice specifically indicates that the decision was reached upon a review of his file, or a personal interview, or changed circumstances, or any combination of these. *Id.* ICE also determined that there was a significant likelihood of Velasco's removal in the reasonably foreseeable future. *Id.*

Also on November 12, 2025, Velasco was granted an informal interview "in order to afford [him] an opportunity to respond to the reasons for revocation of his or her order of supervision stated in the notification letter." ECF No. 6 at pg. 6. Velasco did not make any oral response regarding the reasons for his revocation and did not provide a written statement or documents either. *Id.*

A Warrant for Arrest of Alien was issued against Velasco on November 12, 2025 as well. ECF No. 6 at pgs. 7-8.

## LEGAL FRAMEWORK FOR REMOVAL AND REMOVAL DETENTION

### **I. STATUTORY FRAMEWORK**

The authority for detaining an alien who has been ordered removed is contained at 8 U.S.C. § 1231. Once an alien is ordered removed, and that order becomes final, he or she must be detained for the 90 day period thereafter, which is the so-called "removal period." 8 U.S.C. § 1231(a)(1)(A) (" . . . the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the 'removal period')"); § 1231(a)(2)(a) ("During the removal period, the Attorney General shall detain the alien.").

In *Zadvydas v. Davis*, the Supreme Court held that the 90-day statutory removal period could be extended to six months and remain presumptively reasonable, but, after the six-month period of detention, an alien was entitled to release if they could show “good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future.” 533 U.S. 678, 701 (2001).

After this removal period elapses, § 1231 provides that the alien shall be subject to supervision under prescribed regulations meeting certain conditions. 8 U.S.C. § 1231(a)(3). Additionally, aliens may be detained beyond the removal period if they are “determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal.” 8 U.S.C. § 1231(a)(6).

The statute does not discuss revocation of release at all, but, logically, inherent in the power to detain and the power to release is the power to revoke release.

## II. REGULATORY FRAMEWORK

The Code of Federal Regulations offers more specifics regarding the release and revocation of release of an alien with a final order of removal. Specifically, 8 C.F.R. § 241.4 is entitled “Continued detention of inadmissible, criminal, and other aliens beyond the removal period” and relates to the release (and the revocation of release) of such aliens.

Generally, regulations grant authority to the Commissioner or Deputy Commissioner to grant release or parole to an alien, except that the Commissioner or his or her delegee, Executive Associate Commissioner for Field Operations (Executive Associate Commissioner), the Deputy Executive Associate Commissioner for Detention and

Removal, the Director of the Detention and Removal Field Office or the district director may continue an alien's custody under the provisions of the C.F.R. 8 C.F.R. § 241.4(a).<sup>2</sup>

Once an alien's order of removal becomes final, § 241.4(k)(1)(i) requires the district director or Director of the Detention and Removal Field Office to conduct a custody review. If removal of the alien is impracticable or contrary to the public interest, the alien will be notified in writing that they are to be released or that they will be continued in detention pending removal or further review of their custody status. 8 C.F.R. § 241.4(k)(1)(i). If release is denied, the district director or Director of the Detention and Removal Field Office may retain responsibility for further custody determinations for up to three months after expiration of the removal period, after which, if the alien is not released or removed, responsibility for further custody review is referred to the Headquarters Post-Order Detention Unit ("HQPDU"). 8 C.F.R. § 241.4(k)(1)(ii). The HQPDU is thereafter responsible for custody review at set times, whenever it is deemed warranted, and upon request of the alien if certain conditions are met. 8 C.F.R. §§ 241.4(k)(2)(i-v).

Revocation of release is governed by 8 C.F.R. § 241.4(l). This can occur for two reasons: the alien violates the conditions of release (§ 241.4(l)(1)), or ICE determines in its discretion to revoke release (§ 241.4(l)(2)).

If release is revoked due to a violation of conditions under § 241.4(l)(1), the alien must be notified of the reasons for revocation and afforded an initial informal interview promptly after his return to custody, to afford the alien an opportunity to respond to the reasons for revocation stated in the revocation of release notification. 8 C.F.R. § 241.4(l)(1).

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<sup>2</sup> The titles in this regulation refer to titles held by officials with the Immigration and Naturalization Service and have not been updated to reflect the equivalent titles held by ICE officials.

The regulation providing for revocation of release in the discretion of ICE has no such language requiring notice of the reason for revocation or for an informal interview upon being taken into custody. 8 C.F.R. § 241.4(l)(2). In contrast to the above section, however, revocation under § 241.4(l)(2), in the discretion of ICE, can only be exercised by an Executive Associate Commissioner or district director (§ 241.4(l)(1) has no such limiting language). *Id.* Factors allowing for the revocation of release in the discretion of ICE include: (1) the purpose of the release has been served; (2) the alien violated a condition of release; (3) revocation is appropriate to enforce a removal order or to commence removal proceedings; and (4) the conduct of the alien, or any other circumstance, indicates release would no longer be appropriate. 8 C.F.R. §§ 241.4(l)(2)(i-iv).

DHS has also enacted special regulations for aliens who have “provided good reason to believe there is no significant likelihood of removal to the country to which he or she was ordered removed . . . in the reasonably foreseeable future.” 8 C.F.R. § 241.13(a). Pursuant to that regulation, DHS will release an alien who has made such a showing, subject to appropriate conditions of release. 8 C.F.R. § 241.13(g)(1). Similar to the regulations described above, § 241.13 provides for the revocation of release if the Service determines that there is a significant likelihood that the alien may be removed in the reasonably foreseeable future.” 8 C.F.R. § 241.13(i)(2). This provision does require that the alien be notified for the reasons for revocation of release and that an initial informal interview be conducted upon return to custody to afford the alien an opportunity to respond to the reasons for revocation stated in the notice. 8 C.F.R. § 241.13(i)(3).<sup>3</sup>

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<sup>3</sup> Although the Notice of Revocation by ICE indicates that it is being performed pursuant to 8 C.F.R. § 241.13, nothing in the record establishes that Velasco made a showing that his release was unlikely. Thus, his release was pursuant to § 241.4 not § 241.13. Regardless,

Under either provision “[t]he normal [post-order of removal custody] review process will commence with notification to the alien of a records review and scheduling of an interview, which will ordinarily be expected to occur within approximately three months after release is revoked. That custody review will include a final evaluation of any contested facts relevant to the revocation and a determination whether the facts as determined warrant revocation and further denial of release.” 8 C.F.R. § 241.4(l)(3).

### ARGUMENT

#### **I. THIS COURT LACKS JURISDICTION OVER THIS CASE PURSUANT TO 8 U.S.C. § 1252**

The INA at 8 U.S.C. § 1252(g) strips district courts of jurisdiction over “any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.” This case arises out of the execution of Velasco’s removal order, and therefore this Court lacks jurisdiction to hear this case.

District courts have only that jurisdiction which Congress has provided. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Sheldon v. Sill*, 49 U.S. 441, 448 (1850) (“Congress, having the power to establish the courts, must define their respective jurisdictions.”). Pursuant to the 1996 Illegal Immigration Reform and Immigrant Responsibility Act and the 2005 REAL ID Act, this Court is deprived of jurisdiction over this case. Indeed, the Court of Appeals for the Second Circuit has held that 8 U.S.C. § 1252(g) strips district courts of jurisdiction over habeas claims arising from the execution

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ICE complied with the more stringent requirements of § 241.13 in any event, such that this discrepancy is immaterial.

of removal orders, such as this case. *Singh v. Napolitano*, 500 F. App'x 50, 52 (2d Cir. 2012) (holding that attempt to “employ[] a habeas petition effectively to challenge the . . . execution of [a] removal order,” even “indirectly,” is “jurisdictionally barred”).

Likewise, 8 U.S.C. § 1252(b)(9) bars “[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States” except by “a petition for review filed with an appropriate court of appeals.” 8 U.S.C. § 1252(b)(9), § 1252(a)(5). Re-detaining an alien for purposes of removal constitutes an enforcement mechanism of a removal order. *Tazu v. Att’y Gen. United States*, 975 F.3d 292, 298–99 (3d Cir. 2020) (“Re-detaining Tazu was simply the enforcement mechanism the Attorney General picked to execute his removal. So § 1252(g) funnels review away from the District Court and this Court.”).

In a case similar to this one, ICE detained an alien during her check-in in order to remove her, and revoked her release on an order of supervision. *Westley v. Harper*, No. CV 25-229, 2025 WL 592788, at \*2 (E.D. La. Feb. 24, 2025). The alien filed suit alleging that the process was unlawful, violated her due process, did not comply with federal regulations, and violated the APA. *Id.* The government argued that the matter was outside of the district court’s jurisdiction under 8 U.S.C. § 1252(g), and the court agreed. *Id.* at \*4. The *Westley* court held that all of the actions taken by ICE, including the purported ‘ruse’ of having the alien appear for a check-in only to then detain her for removal, were all directly connected to the execution of a removal order, and thus the district court was precluded from exercising jurisdiction over the claims. *Id.* at \*5-\*6 (“Here, Petitioner was the subject of a final order of removal, and ICE called her to its office, revoked the OSUP, and detained her

with the intent to execute that order and the belief that removal would occur in the reasonably foreseeable future.”). The court further noted that the jurisdiction-stripping provision of § 1252(g) also barred the alien’s claims brought under other statutes, such as the APA. *Id.* at \*6.

Here, as Velasco admits, he challenges his “ongoing detention at Buffalo Federal Detention Facility (“BFDF”) in Batavia, New York.” Pet., ECF No. 1 at ¶ 1. This falls squarely within the purview of § 1252(g), and this Court lacks jurisdiction to interfere with the execution of a removal order. Accordingly, the Petition should be dismissed in its entirety.

**II. ALL REQUESTS FOR RELIEF OTHER THAN RELEASE SHOULD BE DISMISSED AS NONJUSTICIABLE IN A PETITION FOR WRIT OF HABEAS CORPUS**

All requests for relief in the Petition, other than release (or a bond hearing), should be denied because the only proper relief obtainable through a petition for writ of habeas corpus is release. Thus, to the extent the Petition seeks anything beyond release, such requests should be dismissed.

In *Department of Homeland Security v. Thuraissigiam*, the Supreme Court noted that relief through a petition for writ of “[h]abeas has traditionally been a means to secure release from unlawful detention . . . .”. 591 U.S. 103, 107 (2020). In so holding, the Court expressly rejected Thuraissigiam’s attempt to obtain additional administrative review of agency action and, ultimately, remain in the United States. *Id.* That is nearly identical to Velasco’s requests here that this Court review ICE’s decision to revoke his order of supervision and set it aside. Accordingly, such requests should be dismissed in their entirety.

**III. THIS COURT SHOULD DENY VELASCO'S REQUEST TO ENJOIN VELASCO'S TRANSFER OUTSIDE OF THE WESTERN DISTRICT OF NEW YORK**

In his prayer for relief, Velasco asks this Court to enjoin his transfer outside the jurisdiction of this Court. ECF No. 1 at pg. 19. This Court has repeatedly denied such requests previously. *See, e.g., Walker v. Searls*, No. 23-CV-140-LJV, 2024 WL 1735213, at \*7 (W.D.N.Y. Apr. 23, 2024) (holding that jurisdiction attaches on the initial filing for habeas corpus relief, and that jurisdiction is not affected by a transfer outside of the district, so there is no reason for a court to interfere with DHS's authority under 8 U.S.C. § 1231(g)(1) to arrange for appropriate places of detention for aliens); *Tucker v. Searls*, No. 22-CV-608-LJV, 2022 WL 16832642, at \*9 (W.D.N.Y. Nov. 9, 2022); *Forbes v. Garland*, No. 20-CV-1419-LJV, 2021 WL 1588812, at \*8 (W.D.N.Y. Apr. 23, 2021); *Santos Abreu v. Barr*, No. 20-CV-372-LJV, 2020 WL 4504986, at \*7 (W.D.N.Y. Aug. 5, 2020); *De La Rosa v. Barr*, No. 20-CV-383-LJV, 2020 WL 4059111, at \*8 (W.D.N.Y. July 20, 2020); *Ramos v. Barr*, No. 20-CV-371, 2020 WL 4059189, at \*9 (W.D.N.Y. July 20, 2020). Velasco's request here should likewise be dismissed or entirely denied.

**IV. VELASCO'S DUE PROCESS RIGHTS WERE NOT VIOLATED BY HIS BEING TAKEN BACK INTO CUSTODY FOR PURPOSES OF REMOVAL**

Velasco's due process rights were not violated by the revocation of his release in order to execute his valid removal order. Thus, the Petition should be dismissed in its entirety

The Due Process Clause does not protect a "benefit . . . if government officials may grant or deny it in their discretion." *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756 (2005); *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 462-63 (1989); *see Olim v.*

*Wakinekona*, 461 U.S. 238, 249 (1983). The safeguards of the Due Process Clause are not implicated unless the petitioner has been deprived of a constitutionally protected liberty or property interest. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569 (1972). Such an interest can be created by the Due Process Clause itself, or by an independent source such as federal statutes or regulations. *See, e.g., Town of Castle Rock*, 545 U.S. at 756; *Sealed v. Sealed*, 332 F.3d 51, 55 (2d Cir. 2003). In order for a statute or regulation to create a vested liberty interest, it must confer an entitlement to the relief. *Handberry v. Thompson*, 446 F.3d 335, 353 (2d Cir. 2006). That is, the law must place “substantive limitations on official discretion.” *Olim v. Wakinekoma*, 461 U.S. 238, 249 (1983); *see also id.* (“If the decisionmaker is not ‘required to base its decision on objective and defined criteria,’ but instead ‘can deny the requested relief for any constitutionally permissible reason or for no reason at all,’ the State has not created a constitutionally-protected liberty interest” (quoting *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 358, 466-67 (1981) (Brennan, J., concurring))). There is no constitutionally protected interest if the law permits government officials to grant or deny the benefit in their discretion. *Town of Castle Rock*, 545 U.S. at 756.

The Second Circuit and other circuit courts have applied the Supreme Court’s holdings on the reach of the Due Process Clause in the particular context of discretionary relief for aliens subject to final orders of removal and unequivocally concluded that “[a]n alien has no constitutionally-protected right to discretionary relief or to be eligible for discretionary relief.” *Yuen Jin v. Mukasey*, 538 F.3d 143, 157 (2d Cir. 2008) (quoting *Oguejiofor v. Attorney General of U.S.*, 277 F.3d 1305, 1309 (11th Cir. 2002) (emphasis omitted)). In this instance, revocation of release is explicitly governed by 8 C.F.R. § 241.4, which states that ICE “shall have authority, **in the exercise of discretion**, to revoke release

and return to Service custody an alien previously approved for release under the procedures in this section.” 8 C.F.R. § 241.4(1)(2) (boldface added). Thus, no due process violation occurred here.

Additionally, as noted above, Velasco is subject to a valid order of removal. ECF No. 1 at ¶ 16. Velasco has been taken into custody in order to execute the removal order against him. ECF No. 6 at pg. 4. No further due process is required.<sup>4</sup> And, in any event, despite the regulation pertaining to the revocation of his release—8 C.F.R. § 241.4(1)(2)—not requiring it, Velasco was given notice of his revocation of release and the reasons therefore, ECF No. 6 at pg. 4, and an informal interview upon being taken into custody, allowing him the opportunity to give reasons he should not be arrested. ECF No. 6 at pg. 6. This is above and beyond what the regulations require, and constitute due process as far as an alien ordered removed from the United States should be concerned. Accordingly, the allegations of violation of Velasco’s due process rights should be dismissed in their entirety.

**V. EVEN ASSUMING THE APA CLAIM WERE NOT JURISDICTIONALLY BARRED, RESPONDENTS DID NOT VIOLATE ANY RIGHTS VELASCO MAY HAVE UNDER THAT STATUTE**

Velasco’s claim under the APA is barred by the jurisdiction-stripping provisions discussed above. Thus, Velasco’s APA challenge to ICE’s discretionary decision to revoke his supervised release fails under § 701(a)(1) because the Court is deprived of subject-matter jurisdiction by virtue of 8 U.S.C. § 1252(a)(2)(B)(ii). *See, e.g., Bernardo ex rel. M&K Eng’g, Inc. v. Johnson*, 814 F.3d 481, 485 (1st Cir. 2016) (holding that the judicial review bar at

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<sup>4</sup> Unlike the matter of *Ceesay v. Kurzdorfer*, 781 F. Supp. 3d 137, 146 (W.D.N.Y. 2025), there is no Release Notification in this case in which Velasco was promised the opportunity to arrange for an orderly departure. Thus, this case is readily distinguishable and *Ceesay* offers no support for a due process argument here.

§ 1252(a)(2)(B)(ii) applied as a result of statutory terms suggesting a grant of administrative discretion).

In addition to the jurisdiction-stripping provisions of the INA, the APA itself bars this Court from hearing Velasco's APA claims. The APA permits judicial review for "[a] person suffering legal wrong because of agency action," 5 U.S.C. § 702, and provides that an agency action is reviewable if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at § 706(2)(A). However, the APA explicitly excludes any such review "to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." *Id.* § 701(a)(1)-(2). Velasco's action also fails under the second clause of § 701(a) because the INA and relevant regulations make clear that revocation of supervised release is within the agency's discretion. *See* 8 U.S.C. § 1231(a)(6); 8 C.F.R. §§ 241.4(1)(2). Indeed, courts that have considered habeas challenges to post-removal-order orders of supervision have afforded administrative authorities "wide latitude" to impose such orders. *See, e.g., Yusov v. Shaughnessey*, 671 F. Supp. 2d 523, 528 (S.D.N.Y. 2009) (citing cases). Accordingly, to the extent that Velasco challenges the substance of ICE's discretionary decision with regard to his order of supervision (*i.e.*, to revoke it and re-detain him), the Court should decline to consider such challenge, as it lies squarely within the discretion of the agency.

However, even if the claim was not barred under the INA, Velasco has failed to state a claim upon which relief can be granted because, even taking all allegations in the Petition as true, Respondents acted in accordance with regulations, and thus no APA claim can stand.

Velasco rightly cites 8 C.F.R. § 241.4 as the authority for his initial release in 2024 (as opposed to 8 C.F.R. § 241.13, which pertains to aliens who have made an affirmative showing that their removal is not significantly likely to occur within the reasonably foreseeable future). Amend. Pet., ECF No. 1, at ¶¶ 3, 40-41, 96; ECF No. 1-4 at pg. 3.

Importantly, § 241.4(1)(2), the relevant subsection here, does not require notification of the reasons for the revocation or an informal interview where release is revoked based upon the discretion of the official, to enforce a removal order. *Compare* 8 C.F.R. § 241.4(1)(1) (“Upon revocation, the alien will be notified of the reasons for revocation of his or her release or parole. The alien will be afforded an initial informal interview promptly after his or her return to Service custody to afford the alien an opportunity to respond to the reasons for revocation stated in the notification.”) *with* 8 C.F.R. § 241.4(1)(2) (containing no such language or requirements). Thus, Velasco has conflated the two sections and wrongly argued that his revocation of release under § 241.4(1)(2) requires a detailed explanation and an interview, when, in fact, it does not. Pet., ECF No. 1 at ¶ 26.<sup>5</sup> Additionally, § 241.4(1)(2) doesn’t require a “change in circumstances” as Velasco seems to argue for. Pet., ECF No. 1 at ¶ 25.

Because § 241.4 does not require any of the things Velasco claims ICE failed to do (*i.e.* notification before revocation of release, providing a detailed explanation as to why revocation occurred, or providing an interview after revocation), Velasco has failed to plead any violation by ICE under the APA and has thus failed to state a claim upon which relief

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<sup>5</sup> The Petition refers to 8 C.F.R. § 241.4(1)(1) for this proposition, but nothing in the record indicates that Velasco’s order of supervision was revoked for violating conditions. Thus, 8 C.F.R. § 241.4(1)(2) is the operative regulation, which has no interview requirement.

can be granted. Accordingly, the Petition should be dismissed or otherwise denied in its entirety.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that this Court dismiss the Petition in its entirety.

Respectfully submitted,

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**Dated:** December 5, 2025  
Rochester, New York