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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

MARIELA CHINO MORENO, et al., Petitioners, vs. KRISTI NOEM, in her official capacity as Secretary of the Department of Homeland Security, TODD LYONS, in his official capacity as Acting Director of Immigration and Customs Enforcement, EVAN TJADEN, in his official capacity as Acting ICE Field Deputy Officer Director and warden over Respondents, United States Immigration and Customs Enforcement, Respondents.	Case No. 1:26-CV-14-HCN **RESPONDENTS' MOTION TO DISMISS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1) and 12(b)(6)** Judge Howard C. Nielson

1. INTRODUCTION

This case arises from a 2018 incident in which a noncitizen brother assaulted his noncitizen sister. Five years later, after an Immigration Judge ordered Petitioners removed from the United States, Petitioners filed petitions for U nonimmigrant status. (ECF Doc. 4, Exs. 2–6). United States Citizenship and Immigration Services ("USCIS") determined that the petitions were bona fide and granted deferred action and eligibility for employment while the petitions

remain pending. (ECF Doc. 4, Exs. 7–11). Deferred action, however, does not confer immigration status and simply reflects an exercise of administrative discretion that gives a case lower priority for removal.

Prior to filing their U-visa petitions, on November 28, 2023, Petitioners were ordered removed by an Immigration Judge. (ECF Doc. 4, Ex. 1). A Motion to Reopen Jurisdiction was also denied on December 27, 2023. (ECF Doc. 4, Ex. 1). On February 5, 2024, Petitioners filed their petitions. On February 23, 2024, U.S. Immigration and Customs Enforcement ("ICE"), Enforcement and Removal Operations ("ERO"), denied Petitioners' Applications for a Stay of Removal. (ECF Doc. 4, Ex. 12). ICE/ERO directed Petitioners to depart the United States by specified dates. (ECF Doc. 4, ¶ 5). ICE has since placed Petitioners on Intensive Supervision, which includes ankle monitoring and geographic confinement pending removal. (ECF Doc. 4, ¶ 4). On February 25, 2026, this Court entered an order staying Petitioners' removal pending resolution of this petition. (ECF Doc. 14).

Petitioners ask the Court to treat USCIS's Notice of Action reflecting a bona fide U-visa determination as if it created an immigration status or benefit that prevents ICE from executing a valid removal order. It does not. The Form I-797C Notice of Action expressly states that "THIS NOTICE DOES NOT GRANT ANY IMMIGRATION STATUS OR BENEFIT." (ECF Doc. 4, Exs. 7–11) (all caps in original).

2. U-VISA BACKGROUND

In October 2000, Congress created a nonimmigrant visa category for crime victims who assist law enforcement in investigating or prosecuting qualifying crimes. *See* Victims of Trafficking and Violence Protection Act ("VTVPA"), Pub. L. 106-386, 114 Stat. 1464 (2000),

codified at 8 U.S.C. § 1101(a)(15)(U). Such visas confer "U nonimmigrant status." *See Chavarin-Parra v. Garland*, 2022 WL 3451398, at *1 n.1 (10th Cir. Aug. 18, 2022). USCIS may issue only 10,000 principal U visas per fiscal year. 8 U.S.C. § 1184(p)(2). In 2007, USCIS anticipated that the number of eligible petitioners would soon exceed the statutory cap and thus created a regulatory waiting list. 8 C.F.R. § 214.14(d)(2); New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53,014 (Sept. 17, 2007). When USCIS places a petitioner on the waiting list, the petitioner and her qualifying family members receive deferred action. *Id.* USCIS also "may authorize employment for such petitioners and qualifying family members." *Id.*

Since 2010, in each fiscal year, Congress's legislatively imposed statutory cap of 10,000 aliens who can be issued U-1 nonimmigrant visas or granted U-1 nonimmigrant status has been reached. *See* USCIS, I-918, Petition for U Nonimmigrant Status, at https://www.uscis.gov/I-918 (last visited February 25, 2026).[1] And as of June 2025, approximately ***417,898*** principal and derivative U status petitions were pending with USCIS. *See* All USCIS Applications and Petition Form Types (Fiscal Year 2025, Quarter 3) at https://www.uscis.gov/tools/reports-and-studies/immigration-and-citizenship-data (last visited February 25, 2026) (USCIS App'ns).

In 2008, Congress amended the VTVPA to permit USCIS, in its discretion, to grant employment authorization documents ("EADs") to noncitizens with "pending, bona fide" U status petitions. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457, § 201(c), 122 Stat 5044 (Dec. 23, 2008), codified at 8 U.S.C. §

[1] This information is current as of September 9, 2025. *Id.*

1184(p)(6). In June 2021, relying on this statutory authority, USCIS issued policy guidance to address the large number of petitioners awaiting placement on the U visa waiting list. *See* USCIS Policy Alert 2021-13 at 2, bit.ly/4kSqAJ0. The policy permits USCIS, in its discretion, to grant an EAD to a U status petitioner if it determines that his petition is bona fide and that he does not pose a national security or public safety risk. USCIS Policy Manual, Vol. 3, Pt. C, Ch. 5 ("Policy Manual Ch. 5") §§ A, B.[2] This standard is lower than the "full adjudication" standard for waiting list placement. *Id.* § C.

If USCIS determines that a U status petition is bona fide, it may grant the petitioner deferred action from removal. *Id.* In this case, the Form I-797C, Notice of Action, explicitly states that "[d]eferred action is an act of administrative convenience to the government which gives some cases lower priority of removal." *See* ECF Doc. 4, Exs. 7-11. Deferred action specifically, does not grant any immigration status or benefit.

3. LEGAL ARGUMENTS

The petition should be dismissed for multiple independent reasons. First, 8 U.S.C. § 1252(g) bars judicial review of the Executive Branch's decision to execute a final removal order. Second, Petitioners are not "in custody in violation of the Constitution" for purposes of habeas jurisdiction under 28 U.S.C. § 2241(c)(3). Third, even if jurisdiction existed, the petition fails to state a claim because a bona fide U-visa determination does not confer any legal status or bar removal.

A. Section 1252(g) Bars Judicial Review of the Execution of a Final Removal Order.

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[2] USCIS Policy Manual Chapter 5 is available at https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-5.

Under 8 U.S.C. § 1252(g), "no court shall have jurisdiction to hear any cause or claim ... arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders." The Supreme Court has confirmed that this provision bars judicial interference with the Executive Branch's discretionary decisions regarding removal enforcement. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999).

Courts have repeatedly held that 8 U.S.C. § 1252(g) bars challenges seeking to prevent the execution of a final removal order. *See Balogun v. Sessions*, 330 F. Supp. 3d 1211, 1212 (C.D. Cal. 2018) (holding § 1252(g) barred a challenge to ICE's decision regarding when to execute a removal order); *Velarde-Flores v. Whitaker*, 750 F. App'x 606, 607 (9th Cir. 2019)(unpublished) (Section 1252(g) barred habeas petition seeking to enjoin execution of removal order); *Mingrone v. Adducci*, No. 2:17-CV-11685, 2017 WL 4909591, at *4–6 (E.D. Mich. July 5, 2017).

Petitioners seek precisely the type of relief barred by 8 U.S.C. § 1252(g): an order preventing ICE from executing a final removal order while their U-visa petitions remain pending. Because such relief directly interferes with the Executive Branch's removal-enforcement authority, this Court lacks jurisdiction.[3]

B. The Court Lacks Subject Matter Jurisdiction Under 28 U.S.C. § 2241.

Petitioners' habeas claim must also be dismissed because they are not "in custody in

[3] Notably, "[t]he filing of a petition for U-1 nonimmigrant status has no effect on ICE's authority to execute a final order [of removal], although the alien may file a request for a stay of removal pursuant to 8 CFR 241.6(a) and 8 CFR 1241.6(a). 8 C.F.R. § 214.14(c)(1)(ii). In this case, petitioner did just that, and the request for stay of removal was denied. *See* ECF Doc. 4, Ex. 12.

violation of the Constitution" within the meaning of 28 U.S.C. § 2241(c)(3). Petitioner has failed to state a claim that ICE's conditions of release are unlawful. Habeas jurisdiction traditionally requires that a petitioner be subject to significant restraint on liberty comparable to physical detention. *Jones v. Cunningham,* 371 U.S. 236, 243 (1963); *Maleng v. Cook*, 490 U.S. 488, 490–91 (1989).

Petitioners here are not detained. They reside in the community subject to supervision conditions imposed by ICE, including GPS monitoring, geographic limitations, and reporting requirements. These conditions, while restrictive, are administrative terms of release that do not constitute physical confinement.

The Supreme Court has repeatedly described immigration "detention" as physical confinement. *See Jennings v. Rodriguez*, 583 U.S. 281, 307–12 (2018) (distinguishing between detained noncitizens and those released and "free to walk the streets"); *Zadvydas v. Davis*, 533 U.S. 678, 683, 690, 697 (2001) (using "detention" and "custody" to refer to physical confinement); *Johnson v. Arteaga-Martinez*, 596 U.S. 573, 579–82 (2022).

Courts have also recognized that home confinement and electronic monitoring are conditions of release, not detention. *See Fraley v. U.S. Bureau of Prisons*, 1 F.3d 924, 926 (9th Cir. 1993) (home confinement with electronic monitoring is not "official detention"); *Nguyen v. B.I. Inc.*, 435 F. Supp. 2d 1109, 1114 (D. Or. 2006) (placement in DHS's Intensive Supervision Appearance Program, including ankle monitoring and home confinement requirements, did not constitute detention).

The United States asserts that Petitioners' enrollment in the Intensive Supervision Appearance Program ("ISAP") does not rise to the level of physical custody traditionally

required for habeas relief. Petitioners remain free to live in the community, work, and travel within approved areas. Because they are not physically confined, there is no "body" for the government to produce through a writ of habeas corpus.

The United States acknowledges that some courts have held that conditions of release may meet the in-custody requirement for jurisdiction. *See Doe v. Barr*, 479 F. Supp. 3d 20, 26 (S.D.N.Y. 2020). However, even if this Court determines that the release conditions might give rise to meeting the in-custody requirement, the release conditions are not unconstitutional, and the Court lacks subject matter jurisdiction as 28 U.S.C. § 2241(c)(3), requires detention in violation of the Constitution.

The Petitioners have been involved in ongoing removal proceedings. ICE has statutory authority to impose conditions of release during removal proceedings. *See* 8 C.F.R. §§ 1003.19, 236.1(d), 1236.1(d). If a person released from custody wishes to challenge a condition of release they must do so with the Immigration Court. 8 C.F.R. § 1003.19(d)(1). Ankle monitoring is a reasonable restraint that does not violate an alien's due process rights in removal proceedings because it is rationally related to the government's interest in deterring absconders and protecting the community. *See Gozo v. Mayorkas*, No. 1:23-CV-159, 2024 WL 2027510, at *4 (S.D. Tex. Mar. 4, 2024); *Iruene v. Weber*, No. 3:12-cv-1864-0-BH, 2012 WL 5945079, at *2 (N.D. Tex. Aug. 1, 2012) (citing *Nguyen v. BL. Inc.*, 435 F.Supp.2d 1109, 1111-13 (D. Oregon 2006)).

Petitioners' claims challenge ICE's discretionary enforcement decisions rather than unlawful detention. Deferred action and related employment authorization are discretionary and revocable forms of prosecutorial discretion. A bona fide U-visa determination does not create a statutory right to remain in the United States. *See Dep't of Homeland Sec. v. Thuraissigiam*, 591

U.S. 103 (2020) (habeas corpus cannot be used to obtain additional administrative review of immigration determinations).

Because Petitioners are not physically detained in violation of the Constitution and seek review of discretionary enforcement decisions rather than release from custody, this Court lacks jurisdiction under 28 U.SC. § 2241(c)(3). The petition must be dismissed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

C. A Bona Fide U-Visa Determination Does Not Create a Bar to Removal.

The petition should also be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim. A bona fide U-visa determination is only a preliminary finding of eligibility; it does not grant legal status or relief from removal.

The governing regulation for a stay of removal is 8 C.F.R. § 241.6(a), which makes clear that the stay is discretionary and that neither the filing of a stay request nor its pendency "shall delay removal or relieve the alien from strict compliance with any outstanding notice to surrender for deportation or removal." Accordingly, a bona fide determination alone does *not* confer status or relief, it does not divest ICE of the authority to execute a valid removal order.

D. ICE's Enforcement Authority Is Independent of USCIS's Benefit Adjudications.

USCIS and ICE perform distinct statutory functions. USCIS adjudicates applications for immigration benefits, while ICE enforces removal orders and exercises prosecutorial discretion regarding removal.

No statute requires ICE to defer enforcement of a final removal order merely because USCIS has made a preliminary determination regarding a U-visa petition. The regulations governing U-visa petitions make clear that filing such a petition does not prevent removal. *See* 8

C.F.R. § 214.14(c)(1)(ii)(the filing of a U-visa petition has "no effect on ICE's authority to execute a final order" of removal).

Indeed, DHS guidance confirms that individuals subject to final orders of removal may file U-visa petitions with USCIS, but the filing of such petitions does not affect DHS's authority to execute the removal order. Petitioners may request a stay of removal, but the decision whether to grant such relief remains discretionary.[4]

E. Enforcement Discretion Is Separate from Merit Determinations.

The United States Supreme Court has left discretionary decisions to the purview of the Executive Branch. In *Bouarfa v. Mayorkas,* 604 U.S. 6 (2024), the Court confirmed that visa determinations remain discretionary under 8 U.S.C. § 1155, and are not subject to judicial review. This reinforces the principle that the Executive branch retains broad discretion in visa--related determinations, and by extension, removal enforcement based on those determinations.

In this case USCIS can make discretionary decisions regarding whether a bona fide petition has been filed, equally, ICE can make discretionary decisions regarding whether to stay or enforce a removal order, even where a U-visa petition is pending. Either way, the decision is not subject to judicial review by this Court. Accordingly, USCIS may exercise discretion in determining whether a U-visa petition is bona fide, while ICE retains separate discretion

[4] *See* 8 C.F.R. § 214.14(c)(1)(ii); *see also* U Visa Handbook at **https://www.ice.gov/doclib/foia/policy/handbook_HSI_18-06_09.21.2018.pdf?utm_source=chatgpt.com**.

regarding whether to stay or execute a removal order. The existence of a pending U-visa petition and even a bona fide determination, does not limit ICE's authority to enforce a valid removal order.

The relevant regulations, 8 C.F.R. §§ 241.6 and 214.14(c)(1)(ii), expressly preserves ICE's authority to carry out removal orders absent a granted stay. USCIS's finding therefore does not create any legal barrier to removal and pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the petition should be dismissed for "failure to state a claim upon which relief can be granted."

4. CONCLUSION

For the foregoing reasons, the Court should dismiss the petition for lack of subject matter jurisdiction or, in the alternative, deny the petition for habeas corpus relief for failure to state a claim.

RESPECTFULLY SUBMITTED: March 16, 2026.

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CERTIFICATE OF SERVICE

The undersigned employee of the United States Attorney's Office for the District of Utah hereby certifies that on March 16, 2026, the following document:

RESPONDENTS' MOTION TO DISMISS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1) and 12(b)(6)

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