UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Daniel Ramirez Medina,

Petitioner,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN KELLY, Secretary of Homeland Security; NATHALIE ASHER, Director of the Seattle Field Office of U.S. Immigration and Customs Enforcement; and LOWELL CLARK, Warden of the Northwest Detention Center,

Respondents.

CASE NO. 2:17-CV-00218-RSM-JPD

PETITIONER'S BRIEF REGARDING JURISDICTION OVER THE HABEAS PETITION

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I. INTRODUCTION

In this Court's order dated Friday, February 17, 2017, the Court asked the parties to submit briefing on jurisdictional issues on a relatively expedited time table. Given the urgency of the concurrently filed Emergency Motion for Conditional Release Pending Final Determination, the Petitioner believes that it is important to submit to the Court at this time a thorough discussion of the Court's jurisdiction to hear and decide the matter submitted.

This Court has jurisdiction to hear Mr. Ramirez's habeas petition. One of the core purposes of federal habeas corpus is to review the legality of executive detentions, including immigration-related detentions that occur before, during, or after removal proceedings. *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest."). Section 2241 allows persons "in custody under or by color of the authority of the United States" to seek writs of habeas corpus from federal courts, as well as those persons "in custody in violation of the Constitution or laws . . . of the United States." 28 U.S.C. § 2241.

Mr. Ramirez's habeas petition falls squarely within the traditional scope of habeas petitions challenging executive detention. The only relief Mr. Ramirez seeks is immediate release from detention. *See* Am. Pet. for Writ of Habeas Corpus and Compl. for Declaratory and Injunctive Relief ("Am. Pet.") at 24, ECF No. 41. And the basis for Mr. Ramirez's claims are the unlawful investigation and arrest—that officers arrested and detained Mr. Ramirez without reasonable suspicion, probable cause, or a warrant, and that the arrest was infected with racial stereotyping constituting unconstitutional racial and national origin discrimination. Thus, Mr. Ramirez has alleged that the arrest and detention deprived him of his constitutionally-protected interest to live in the United States without being subject to arrest or detention based on his immigration status. There are

many reasons why the government's actions are unconstitutional. But none of Mr. Ramirez's claims challenge the government's removal proceedings.

No statute strips this Court of jurisdiction over Mr. Ramirez's habeas petition. Although the REAL ID Act of 2005 prohibits habeas petitions that challenge final orders of removal, no such removal order exists here. *See* 8 U.S.C. § 1252(a)(5). And while the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") precludes habeas challenges to the Attorney General's commencement of removal proceedings, Mr. Ramirez's claims challenge only the constitutionality of his arrest and continued detention. *See* 8 U.S.C. § 1252(g). Finally, concluding there is no jurisdiction over Mr. Ramirez's habeas petition would raise serious constitutional questions. In *INS v. St. Cyr*, the Supreme Court held that withdrawing habeas jurisdiction over immigration cases posed serious constitutional issues, and that courts would conclude that Congress had withdrawn habeas jurisdiction over such cases only where a statute contained a "clear statement" and no alternative construction of the statute was "fairly possible." 533 U.S. at 298, 299-300 (internal quotation marks and citation omitted). No such clear statement exists here. The relevant statutes are properly read to mean that the court has jurisdiction over Mr. Ramirez's petition.

II. THIS COURT HAS JURISDICTION OVER MR. RAMIREZ'S HABEAS PETITION

A. The Court Has Jurisdiction Over Mr. Ramirez's Habeas Petition, Which Challenges Only His Arrest and Detention, Not Removal Proceedings.

"[E]ven post-[REAL ID Act], aliens may continue to bring collateral legal challenges to the Attorney General's detention authority . . . through a petition for habeas corpus." *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942, 946 (9th Cir. 2008). Courts routinely hear habeas petitions challenging a person's immigration-related detention. *See, e.g.*, *Flores-Torres v. Mukasey*, 548 F.3d 708, 713 (9th Cir. 2008) (allowing detention challenge during removal proceedings); *Hernandez v. Gonzales*, 424 F.3d 42, 42 (1st Cir. 2005) (entertaining habeas petition "challenging . . . continued

detention" in light of Supreme Court decision); *Baez v. Bureau of Immigration and Customs Enforcement*, 150 F. App'x 311, 312 (5th Cir. 2005) (per curiam) (same). These challenges include claims that the government lacks the constitutional and statutory authority to detain the petitioner, *Casas-Castrillon*, 535 F.3d at 945, or that the government failed to afford the petitioner required bond hearings, *Singh v. Holder*, 638 F.3d 1196, 1200 (9th Cir. 2011). Habeas petitions may challenge "the constitutionality of [an] arrest and detention" so long as the petition does not challenge an existing "underlying administrative order of removal." *Kellici v. Gonzales*, 472 F.3d 416, 420 (6th Cir. 2006); *see also Themeus v. U.S. Dep't of Justice*, 643 F. App'x 830, 832-33 (11th Cir. 2016) (reviewing claim challenging immigration detainer, but not claims challenging removal order).

All of Mr. Ramirez's claims have one thing in common—they challenge only Mr. Ramirez's arrest and detention, not any removal proceedings. Mr. Ramirez claims his arrest and detention violate the Fourth Amendment because the officers did not have reasonable suspicion or probable cause, much less a warrant, to arrest and detain him, Am. Pet. at ¶¶ 70-74, and the Fifth Amendment because his arrest and detention were infected with racial stereotyping and discrimination, Am. Pet. at ¶¶ 75-82. Finally, Mr. Ramirez alleges the arrest and detention unconstitutionally terminated his protected interest in living in the United States without being subject to arrest and detention based on his immigration status. *Id.* ¶ 63 (alleging his "detention is in violation of the procedural due process rights guaranteed by the Fifth Amendment"); *id.* ¶ 69 (alleging his "detention is in violation of his substantive due process rights"). These claims fall squarely within the court's habeas jurisdiction, and Mr. Ramirez has a right to habeas review under § 2241.

The only relief Mr. Ramirez accordingly seeks is *relief from that detention*—an immediate release from custody. Am. Pet. at 24 ("Prayer for Relief").

B. Section 1252 Does Not Apply; Its Preclusion of Habeas Review Is Limited to Challenges to Removal Orders or Proceedings.

Enacted as part of IIRIRA, § 1252(g) removes federal courts' ability "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" when the claim is part of a habeas petition. 8 U.S.C. § 1252(g). In *Reno v. American-Arab Anti-Discrimination Committee* (hereinafter "*AADC*"), the Supreme Court cautioned against a "broad" understanding of § 1252(g) that would remove federal courts' habeas jurisdiction over all cases related to removal proceedings. 525 U.S. 471, 478 (1999); *see also Catholic Soc. Servs., Inc. v. INS*, 232 F.3d 1139, 1150 (9th Cir. 2000) (noting that § 1252(g) does not bar "all claims relating in any way to deportation proceedings"). Rather, *AADC* held that § 1252(g) "applies only to three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'" 525 U.S. at 482 (quoting 8 U.S.C. § 1252(g)) (emphasis added by the Court). Section 1252(g) does not extend to the "many other decisions or actions that may be part of the deportation process-such as the decisions to open an investigation, [or] to surveil the suspected violator." *Id.* The Ninth Circuit has "narrowly construed section 1252(g)" to reflect its enumeration of these three highly specific categories of cases. *Kwai Fun Wong v. United States*, 373 F.3d 952, 964 (9th Cir. 2004) (explaining a prior holding that § 1252(g)'s "reference to 'executing removal orders'" does not "refe[r] to the underlying merits of the removal decision"); *Sulit v. Schiltgen*, 213 F.3d 449, 452-54 (9th Cir. 2000) (holding that § 1252(g) did not bar due process claims challenging INS's failure to provide notice of adjustment of status and INS's improper seizure of green cards).

Other circuits have followed suit. For example, the Eleventh Circuit has held that § 1252(g) only "bars courts from reviewing certain exercises of discretion by the attorney general, it does not proscribe substantive review of the underlying legal bases for those discretionary decisions and actions." *Madu v. U.S. Att'y Gen.*, 470 F.3d 1362, 1368 (11th Cir. 2006). Thus, petitioners can "brin[g] . . . constitutional challenge[s] to . . . detention and impending removal." *Id.*; *see also id.*

(explaining that § 1252(g) "was directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion" (quoting *AADC*, 525 U.S. at 485 n.9)).

Another IIRIRA provision, § 1252(b)(9), directs that judicial review of legal and factual questions "arising from any action taken or proceeding to remove an alien . . . shall be available only in judicial review of a final order," rather than via a habeas petition under § 2241. 8 U.S.C. § 1252(b)(9). In *St. Cyr*, the Court thus held that § 1252(b)(9) "applies *only* '[w]ith respect to review of an *order of removal*.'" 533 U.S. at 313 (emphases added). Section 1252(b)(9) "'does not apply to federal habeas corpus'" proceedings "'that do not involve final orders of removal'" or raise "claims that are collateral to, or independent of, the removal process." *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1032 (9th Cir. 2016) (quoting *Nadarajah v. Gonzales*, 443 F.3d 1069, 1075 (9th Cir. 2006)).

Finally, the REAL ID Act added to these provisions § 1252(a)(5), which likewise underscores that a "petition for review," rather than a habeas petition under § 2241, is the "exclusive means for judicial review of an order of removal entered or issued." 8 U.S.C. § 1252(a)(5). "The language added by the REAL ID Act," however, did "nothing to change or undermine [*St. Cyr*'s] analysis" that the statutes restricting habeas review "appl[y] *only* . . . to review of an order of removal." *Singh v. Gonzales*, 499 F.3d 969, 978 (9th Cir. 2007) (internal quotation marks omitted). The text of the statute refers only to cases where removal orders have already been entered. And the House Report on the REAL ID Act emphasized that the statutes "would not preclude habeas review over challenges to detention that are independent of challenges to removal orders. Instead, the bill would eliminate habeas review only over challenges to removal orders." H.R. Rep. No. 109-72 at 175, 2005 U.S.C.C.A.N. 240, 300; *id.* at 174 (explaining that the Act was "address[ing] the anomalies created by *St. Cyr*"). Indeed, because statutes repealing habeas jurisdiction are construed narrowly, the Third Circuit has held that immigration detainees can, under section 2241, challenge their deportations on the ground that "there was *no* order of removal" because the statutes limit federal courts' habeas

jurisdiction only over challenges to orders of removal, not challenges based on the absence of a removal order. *Kumarasamy v. Att'y Gen. of U.S.*, 453 F.3d 169, 172 (3d Cir. 2006).

C. Section 1252 Does Not Limit Classic Habeas Challenges To Executive Detentions, Which, If Successful, Would Cast Doubt On The Government's Ability To Remove a Petitioner.

"The statute, by its plain language, applies only to 'judicial review of an order of removal' and does not eliminate the ability of a court to review claims that are 'independent of challenges to removal orders,'" such as challenges to a petitioner's detention before, during, or after immigration proceedings. *Martinez v. Napolitano*, 704 F.3d 620, 622 (9th Cir. 2012) (quoting H.R. Rep. No. 109-13, at 175, 2005 U.S.C.C.A.N. 240 at 300). No statute removes federal courts' jurisdiction under § 2241 to entertain challenges to detention, as opposed to challenges to removal.

Nor do the statutes preclude detention challenges that, if successful, would undermine, if not eliminate, the government's ability to remove the habeas petitioner. For example, in *Flores-Torres v. Mukasey*, 548 F.3d 708 (9th Cir. 2008), the Ninth Circuit held that the district court had habeas jurisdiction to hear the claim that the government lacked authority to detain the petitioner because he was a citizen. *Id.* at 713. If the petitioner was a citizen, the government could not have then removed him. The court reasoned that the mere fact that "the question of [the government's] authority to detain [a petitioner] is intertwined with the . . . claim at issue in [the petitioner's] removal proceedings" does not mean that the petitioner "must" raise that "challenge . . . by means of a petition for review of a final order of removal." *Id.* at 711-12. The statutes do not contain "a particularly clear statement" to foreclose habeas review under those circumstances. *Id.* at 712 (quoting *Demore v. Kim*, 538 U.S. 510, 517 (2003)); *see also Singh v. Vasquez*, 448 F. App'x 776, 778-79 (9th Cir. 2011) (reviewing challenges to rescission of asylum status pursuant to petition for habeas corpus, which, if successful would have eliminated basis for removal); *Villegas-Sarabia v. Johnson*, 123 F. Supp. 3d 870, 895

(W.D. Tex. 2015) (allowing detention challenge premised on petitioner's citizenship while removal proceedings ongoing).

Other courts have reached the same conclusion. The First Circuit has held that under § 2241, non-citizens can raise substantive due process claims that allege their immigration detentions and transfers violate their constitutional "right to family integrity," a right which would also be implicated by any future removal. *Aguilar v. U.S. Immigration and Customs Enforcement Div.*, 510 F.3d 1, 19-20 (1st Cir. 2007) (acknowledging the "claims bear some connection to removal"). Similarly, the Third Circuit has held there was habeas jurisdiction over claims that were filed by an individual detained for immigration reasons who sought to have Customs and Immigrant Services adjudicate his relative asylum petition, which, if unsuccessful, would have resulted in his deportation. *Nnadika v. Att'y Gen. of U.S.*, 484 F.3d 626, 633 (3d Cir. 2007). The court reasoned, "[t]o the extent that [the petitioner] is detained as a result of the denial" of the relative petition, the claim "fall[s] within" the district court's jurisdiction. *Id.* Finally, courts have uniformly concluded that petitioners can challenge their detentions on the basis that there is no valid order of removal that might justify their detention, even though, again, the absence of a removal order would mean the petitioner could not be removed. *Madu v. U.S. Att'y Gen.*, 470 F.3d 1362, 1367 (11th Cir. 2006) (collecting cases).

D. The Only "Indirect" Challenges To Removal Precluded By Statute Are Challenges That Explicitly Challenge Removal Orders or the Removal Process.

The Ninth Circuit has made clear that "by [their] terms, the jurisdiction-stripping provision[s] do[] not apply to federal habeas corpus petitions that do not involve final orders of removal." *Nadarajah v. Gonzales*, 443 F.3d 1069, 1075 (9th Cir. 2006) (finding jurisdiction to consider challenge to continued detention pending resolution of removal proceedings); *see also Trinidad y Garcia v. Thomas*, 683 F.3d 952, 956 (9th Cir. 2012) (en banc) ("The REAL ID Act can be construed as being confined to addressing final orders of removal, without affecting federal habeas

jurisdiction."). That conclusion is bolstered by § 1252's title, which is "Judicial review of *orders of removal*." 8 U.S.C. § 1252 (emphasis added); *cf. Begay v. United States*, 553 U.S. 137, 146 (2008) (interpreting provision "[a]s suggested by its title").

Because the statutes foreclose judicial review of orders of removal, courts have also held that "claims that indirectly challenge a removal order" may not be raised in a collateral attack. *Martinez v. Napolitano*, 704 F.3d 620, 622, 623 (9th Cir. 2012). But that rule excludes from habeas jurisdiction only those claims that are "inextricably linked to [an] order of removal." *Id*. at 633 (internal quotation marks omitted). Whether a claim indirectly challenges a removal order "turn[s] on the substance of the relief that a plaintiff is seeking," *id.* at 622 (internal quotation marks omitted), and "determining when the REAL ID Act preempts habeas jurisdiction requires a case-by-case inquiry turning on a practical analysis." *Singh v. Holder*, 638 F.3d 1196, 1211 (9th Cir. 2011).

Claims that are "inextricably linked" to removal orders almost uniformly involve cases with actual removal orders, and claims that amount to nothing more than challenges to those orders. *See Martinez*, 704 F.3d at 623 ("Martinez challenges the procedure and substance of the BIA's determination that he was ineligible for asylum, withholding of removal, and relief under the CAT."); *Estrada v. Holder*, 604 F.3d 402, 404, 408 (7th Cir. 2010) ("The challenges . . . seek to vacate the . . . order" rescinding permanent resident status which petitioner sought "in the removal proceedings."); *Foster v. Townsley*, 243 F.3d 210, 211-12 (5th Cir. 2001) (noting petitioner's claim that he "was improperly removed," among other claims, arose "out of the INS's deportation"); *Haider v. Gonzales*, 438 F.3d 902, 910 (8th Cir. 2006) (explaining that the "challenge to the constitutionality of the notice provided . . . attack[ed] the IJ's removal order" and that petitioner "ma[d]e the same argument . . . in his Petition for Writ of Habeas Corpus that he makes in his Petition for Review"); *cf. Humphries v. Various Fed. USINS Emps.*, 164 F.3d 936, 945 (5th Cir. 1999) (dismissing damages claim for retaliatory exclusion but suggesting "such challenges" could be brought "either in a petition

for review or for habeas corpus"). A narrow interpretation of which claims are "inextricably linked" to removal orders follows from the canon of constitutional avoidance, as well as the rule requiring a clear statement before concluding habeas jurisdiction has been repealed. *See infra* II.F. A broad interpretation of which claims are "inextricably linked" to removal orders would eliminate federal courts' habeas jurisdiction over claims that are not specifically precluded by the statutes, which only bar challenges to "final order[s]" of removal, removal orders "entered or issued," and decisions to "'commence proceedings, adjudicate cases, or execute removal orders." 8 U.S.C. § 1252.

Thus, for example, in *Anguiano-Hernandez v. United States*, 584 F. App'x 822 (9th Cir. 2014), the court concluded the district court did not have habeas jurisdiction over a petition that argued a "removal order was 'obtained unlawfully' and was 'wholly improper.'" *Id.* at 823; *see also id.* (petitioner "frame[d] the central question . . . as 'whether it was a fundamental error . . . for the Department of Homeland Security to issue an Order to Show Cause . . . and thereafter for the Immigration Judge to issue a removal order"). Similarly, in *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011), the court concluded that it did not have jurisdiction to review a request for "relief from immigration detention" because the petition did "nothing more than attack the IJ's removal order." *Id.* at 1211. The petitioner "ma[d]e[] the same arguments in his habeas petition as he makes in his petition for review." *Id. Singh* nonetheless emphasized that "there are many circumstances in which an alien subject to an order of [] removal can properly challenge his immigration detention in a habeas detention without unduly implicating the order of removal," including where the "habeas challenge to detention ha[s] a basis independent of the merits of [a] petition for review." *Id.* Moreover, "[e]ven where the bases for the habeas petition and petition for review [a]re related," a "detention challenge could stand alone," so long as it did not ask a court to "predict[] . . . what [a] court is likely to conclude when it decides [a] petition for review." *Id.* at 1212.

E. Mr. Ramirez Is Not Directly or Indirectly Challenging Any Aspect of the Removal Process.

Mr. Ramirez does not challenge any removal order. Indeed, no removal order has been issued. Mr. Ramirez's challenges to his arrest and detention are independent and collateral to any pending removal proceedings because Mr. Ramirez's equal protection and unlawful discrimination challenges concern Respondents' investigation, and his subsequent arrest and detention. Even if these claims might be related to, and bear on claims he might raise in removal proceedings, that does not mean Mr. Ramirez's habeas petition falls outside the scope of the court's habeas jurisdiction. *See Flores-Torres*, 548 F.3d at 711-12; *Aguilar*, 510 F.3d at 19-21; *Nnadika*, 484 F.3d at 633; *Madu*, 470 F.3d at 1367.

The Ninth Circuit has also held that courts retain habeas jurisdiction even where the petitioner's "complaint could be read to challenge the constitutionality of the removal itself." *Kwai Fun Wong*, 373 F.3d at 964. In *Kwai Fun Wong*, the petitioner disclaimed "a broad reading of her ambiguous allegations" and limited her challenge to "claims aris[ing] from the discriminatory animus that motivated and underlay the actions of the individual defendants which *resulted in* the INS's decision to commence removal proceedings." *Id.* The court concluded that it had jurisdiction over those claims under § 2241 because the statutes do "not bar review of the actions that occurred *prior* to any decision to 'commence proceedings,'" including "INS officials' allegedly discriminatory decisions." *Id.* at 965.[1]

[1] The two cases finding no jurisdiction over detention challenges without accompanying removal orders are easily distinguished. In *J.E.F.M. v. Lynch*, 837 F.3d 1026 (9th Cir. 2016), the petitioners sought a ruling that they were entitled to counsel in their removal proceedings. The court therefore concluded the claims were "an inextricable part of" the removal process. *See id.* at 1033; *see also Aguilar*, 510 F.3d at 13 (same conclusion, same claim). *Sissoko v. Rocha*, 509 F.3d 947 (9th Cir. 2007), addressed a *Bivens* claim for damages against a federal official, not a petition for habeas corpus. In the "limited context" of a *Bivens* action for false arrest, the court concluded that § 1252(g) precluded review where "a half-completed Form I-860" indicated that the petitioner's since completed "detention arose from [an agent's] decision to commence expedited removal proceedings." *Sissoko*, 509 F.3d at 950, 949. But *Sissoko* also explained that, in *AADC*, the Supreme Court "did not end its inquiry" "[a]fter concluding that the claims

And the government's mere issuance of a notice to appear (NTA) cannot and does not deprive the court of jurisdiction over Mr. Ramirez's habeas petition. The NTA cannot deprive the court of jurisdiction over those claims, because the NTA does not establish – and indeed it is not true – that the investigation, arrest, and detention challenged in this case were solely related to the removal proceedings the government has since elected to institute. If it did, then the government could stop courts' inquiry into an individual's arrest and detention just by issuing a notice to appear, and insisting after-the-fact that everything raised in court is a part of the decision to commence removal proceedings. Habeas jurisdiction cannot be eliminated in this way. *Cf. Boumediene v. Bush*, 553 U.S. 723, 765-66 (2008) (rejecting the contention that "the political branches have the power to switch the Constitution on or off at will" and explaining that "[t]hese concerns have particular bearing upon the Suspension Clause . . . for the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers. The test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain.").

In keeping with this understanding, several district courts have concluded they retain jurisdiction over claims of discriminatory arrests that eventually lead to removal proceedings. *Diaz-Bernal v. Myers*, 758 F. Supp. 2d 106, 124 (D. Conn. 2010) (explaining that while courts may not "have jurisdiction to hear claims arising from the decision to issue a notice to appear" they do "have jurisdiction to hear claims arising from a plaintiff's arrest and detention"); *El Badrawi v. Dep't of Homeland Sec.*, 579 F. Supp. 2d 249, 265-66, 268 (D. Conn. 2008); *Argueta v. U.S. Immigration & Customs Enforcement*, No. 08-1652 (PGS), 2009 WL 1307236, at *14 (D.N.J. May 7, 2009)

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fell within the ambit of § 1252(g)." *Sissoko*, 509 F.3d at 951. Rather, *AADC* "proceeded to address whether the particular constitutional harms … justified reading the statute to allow the lawsuit," *Sissoko*, 509 F.3d at 951, and *AADC* did not "rule out the possibility of a rare case in which the alleged basis of discrimination is so outrageous" that review would be proper under section 2241, *AADC*, 525 U.S. at 491-92. After concluding that the false arrest claims did not involve such circumstances, *Sissoko* concluded that the court lacked jurisdiction to consider the petitioner's claim for damages against a federal official arising from his detention. 509 F.3d at 951.

(concluding there was habeas jurisdiction where petitioner "complains of his arrest, not based upon its validity before the Immigration Court in deportation proceedings, but because . . . it was effectuated based upon his race and ethnicity, in violation of his Fifth Amendment right").

A hypothetical illustrates how and why the district court has habeas jurisdiction over Mr. Ramirez's claims notwithstanding the NTA and later instituted removal proceedings. Imagine ICE agents rounded up Latinos as result of a racially discriminatory enforcement action. Once at a processing facility, ICE then determined that those arrested and detained include citizens, lawful permanent residents, and DACA beneficiaries. ICE then released everyone in the first two groups, but continued to detain the DACA beneficiaries. Habeas for that group would be appropriate in the district court, even if the government subsequently initiated removal proceedings.

Finally, even where the government detains an individual as part of a valid removal proceeding, that individual can still challenge the legal basis for his detention via a habeas petition. *See Flores-Torres*, 548 F.3d at 711-12; *Aguilar*, 510 F.3d at 19-21; *Hernandez*, 424 F.3d 42-43; *Casas-Castrillon*, 535 F.3d at 946-47. Here, Mr. Ramirez alleges his detention, pending removal or not, violates his constitutional rights. That is exactly the kind of challenge that habeas courts remain open to hear.

F. Courts Must Interpret Statutes To Avoid Foreclosing Habeas Review of Executive Detentions.

Rejecting these statutory arguments, and concluding that the court does not have jurisdiction over Mr. Ramirez's habeas petition, would also raise serious constitutional concerns. In *INS v. St. Cyr*, the Supreme Court made it clear that any Congressional attempt to withdraw federal courts' habeas jurisdiction over immigration cases would pose serious Suspension Clause concerns. 533 U.S. at 300 (explaining constitutional concerns with foreclosing habeas review of claim brought by "an alien subject to a federal removal order"); *id.* at 305 (emphasizing that any removal of federal courts'

habeas jurisdiction over immigration cases "would represent a departure from historical practice in immigration law[, because t]he writ of habeas corpus has always been available to review the legality of Executive detention"). *Boumediene v. Bush* confirmed that the Constitution requires the availability of habeas corpus review for executive detentions. 553 U.S. 723, 745, 771 (2008). "The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom." *Id.* at 739. The Constitution "protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account." *Id.* at 745; David Cole, *Jurisdiction and Liberty: Habeas Corpus And Due Process As Limits On Congress's Control of Federal Jurisdiction*, 86 Geo. L.J. 2481, 2495-96 (1998). Executive detentions, which threaten liberty "without legal constraint," *Boumediene*, 553 U.S. at 765, pose a significant risk of "arbitrary imprisonment[]," *id. at* 744 (quoting The Federalist No. 84)). Construing the statutory provisions at issue in this case, several judges on the Ninth Circuit wrote, "[t]he elimination of all forms of judicial review of executive detention would violate the Constitution." *Trinidad y Garcia v. Thomas*, 683 F.3d 952, 959 (9th Cir. 2012) (en banc) (Thomas, J., concurring).

St. Cyr rejected the government's argument that "the traditional scope of the writ" of habeas corpus, which the Constitution protects, did not extend to cases "where an official had statutory authorization to detain the individual but the official was not properly exercising his discretionary power to determine whether the individual should be released." 533 U.S. at 303 (internal quotation marks and ellipses omitted); *see id.* at 307-08 ("Habeas courts also regularly answered questions of law that arose in the context of discretionary relief."); *see generally* Gerald L. Neuman, *Habeas Corpus, Executive Detention and the Removal of Aliens*, 98 Colum. L. Rev. 961 (1998) (summarizing historical evidence).

The canon of constitutional avoidance requires courts to "construe [federal] statute[s] to avoid" "serious constitutional problems" so long as another construction is "acceptable" and "reasonable," *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988), or even "fairly possible," *St. Cyr*, 533 U.S. at 300. Given the central historical role that federal habeas review has played in reviewing executive detentions and the Founders' decision to protect the Great Writ in the Suspension Clause, this Court should avoid interpreting the statutes at issue as stripping the federal courts of habeas jurisdiction if "an alternative interpretation of the statute is 'fairly possible.'" *St. Cyr*, 533 U.S. at 300 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

For example, in *St. Cyr,* the Court found several provisions in IIRIRA subject to reasonable alternative interpretations. Congress had repealed a statutory provision that allowed for habeas review in immigration cases involving non-citizens who were deportable because of criminal offenses, and enacted several provisions restricting the availability and scope of habeas review. *St. Cyr*, 533 U.S. at 297-298, 308-14. Despite these clear statements, including a provision entitled "Elimination of Custody Review by Habeas Corpus," *St. Cyr* held that non-citizens who were deportable because of criminal offenses could still challenge removal orders in a habeas proceeding because of the grave constitutional issues with eliminating habeas review. *See id.* at 314.

In addition to the canon of constitutional avoidance, two other fundamental canons of federal jurisdiction also counsel against interpreting statutes as removing federal courts' jurisdiction over habeas review of executive detentions. First, federal courts will not interpret legislation as impliedly repealing their jurisdiction. *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 379 (2012) (noting that the "divestment of district court jurisdiction should be found no more readily than divestment of state court jurisdiction, given the longstanding and explicit grant of federal question jurisdiction" (internal alterations omitted)); *id.* at 382 (federal "jurisdiction … should hold firm against 'mere implication

flowing from subsequent legislation'" (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 808 (1976)). Second, it is well established that only "a particularly clear statement" from Congress will foreclose habeas review over executive immigration detentions. *Demore v. Kim*, 538 U.S. 510, 517 (2003); *see also St. Cyr*, 533 U.S. at 298 ("[T]he longstanding rule requir[es] a clear statement of congressional intent to repeal habeas jurisdiction." (citing *Ex parte Yerger*, 8 Wall. 85, 102 (1869) ("We are not at liberty to except from [habeas corpus jurisdiction] any cases not plainly excepted by law.")). There is no clear statement removing habeas jurisdiction here.

III. CONCLUSION

Petitioner respectfully requests that this Court exercise its habeas jurisdiction in this matter and grant the request for immediate release on bail pending the resolution of the habeas petition.

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Seattle, Washington

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document should automatically be served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

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