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

DANIELA VARGAS, Petitioner, v. U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN KELLY, Secretary of DHS; DAVID D. RIVERA, Director of the New Orleans Field Office Director; and DAVID COLE, Warden of the LaSalle Detention Facility, Respondents.	CIVIL CASE NO. JUDGE: MAGISTRATE JUDGE:

PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF EMERGENCY MOTION FOR STAY OF REMOVAL

TABLE OF CONTENTS

Petitioner Daniela Vargas, a 22-year-old woman who has lived in the United States since the age of seven, is currently detained at the LaSalle Detention Facility in Jena, Louisiana. Notwithstanding a pending application to renew her grant of deferred action under the Deferred Action for Childhood Arrivals ("DACA") program and a pending application for a "U" visa, Ms. Vargas—who has lived most of her life in Mississippi—is at imminent risk of being deported from this country in violation of her Fifth Amendment right to due process and in retaliation for her exercise of her First Amendment right to free speech.

Ms. Vargas was arrested on March 1, 2017 by Immigration and Customs Enforcement ("ICE") agents in Jackson, Mississippi, minutes after leaving a press conference at which she spoke critically about recent ICE actions—including actions against her own family. Two weeks earlier, ICE agents had arrested Ms. Vargas' father and brother, but declined to arrest her as a matter of discretion—despite knowing that her previously issued period of deferred action had expired.[1] Instead, ICE agents told Ms. Vargas they were giving her a "hall pass." In the two weeks between the arrests of her father and brother and the date of her own, Ms. Vargas spoke publicly multiple times about how terrified she had been by the ICE agents' actions. Those statements led the same agents to target Ms. Vargas for arrest and removal—or revocation of her "hall pass"—notwithstanding that doing so flagrantly violated her First Amendment rights.

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1 Pursuant to DACA, in 2012 Ms. Vargas was granted a two-year period of deferred action, which was renewed for an additional two-year period in 2014. That second period expired in late 2016, as Ms. Vargas could not at that time pay the $465 fee (which was increased to $495 in December 2016). On February 10, 2017, however, Ms. Vargas submitted the $495 fee and a second renewal application, which remains pending today. *See* Decl. of Daniela Vargas ("Vargas Decl.") (attached as Ex. A) ¶¶ 10.

ICE intends to swiftly remove Ms. Vargas from the country without a hearing. It asserts that Ms. Vargas entered the United States pursuant to the Visa Waiver Program ("VWP"), which permits nationals of certain countries to enter the United States without a visa on the condition that they agree to waive their rights to contest their removal on any ground except asylum. 8 U.S.C. § 1187(b)(2). But Ms. Vargas was only seven years old when she came to this country. Even assuming that she entered through the VWP—evidence ICE has yet to produce, and of which Ms. Vargas has no personal knowledge—she could not have made the kind of knowing and voluntary waiver required to summarily remove her as a VWP overstay. ICE's decision to remove her without a hearing not only violates her constitutional right to due process, but it deprives her of immigration relief for which she is eligible, and threatens to deport her to a country that she barely remembers and to which she fears returning.

In light of the foregoing, and as further explained below, an emergency stay of Ms. Vargas' removal while the Court considers her habeas petition is necessary to prevent her from being irreparably harmed, as well as to preserve the Court's ability to adjudicate the petition itself, on which Ms. Vargas has a substantial likelihood of success.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Background on Ms. Vargas

Petitioner Daniela Vargas is a 22-year old woman who was born in Argentina and came to the United States in 2001 at the age of seven. *See* Ex. A Vargas Decl. ¶¶ 2-3. Ms. Vargas has lived in the United States for more than 15 years, most of which she has spent in Mississippi, which she considers her home. *Id.* ¶ 2. In 2013, Ms. Vargas graduated with honors from Morton High School in Morton, Mississippi, where she was

the first chair trumpet in the school band, played softball, and was a volunteer tutor. *Id.* ¶ 4. Since graduating, she has sought to continue her education, toward her career goal of becoming a math professor. *Id.* ¶ 7.

Notwithstanding the various ways she has been (and remains) a typical Mississippian, Ms. Vargas' life in the United States has been different in one key respect: for significant parts of it, she has been undocumented. Ms. Vargas has no recollection or personal knowledge of the legal process through which she came to the United States, but at some point in her childhood she became aware of the fact that she was undocumented. *See id.* ¶ 3. In 2012, however, the Department of Homeland Security ("DHS") created the Deferred Action for Childhood Arrivals ("DACA") program to provide temporary relief from deportation for undocumented individuals, like Ms. Vargas, who came to this country as children, lack a serious criminal history, attend school, pay a fee, and meet other criteria.[2] Pursuant to DACA—which continues in operation today[3]—individuals meeting its criteria can request that the DHS Secretary grant them deferred action,[4] a

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2 *See* Mem. of Janet Napolitano, Sec'y of Homeland Security, to David V. Aguilar, Acting Commissioner, United States Customs and Border Protection ("CBP"), Alejandro Mayorkas, Director, United States Citizenship and Immigration Services ("USCIS"), and John Morton, Director, United States Immigration and Customs Enforcement ("ICE"), *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, June 15, 2012 ("2012 DACA Memorandum") (attached as Ex. A to Pet. (Doc. No. 1-1).

3 The current administration has made clear that the DACA program remains in place. *See, e.g.*, Mem. of John Kelly, Sec'y of Homeland Security, to DHS Officials, *Enforcement of the Immigration Laws to Serve the National Interest*, February 20, 2017 at 2 (expressly exempting the 2012 DACA Memorandum from policy changes otherwise ordered therein), (attached as Ex. A to Pet. (Doc. No. 1-2).

4 *See* 8 C.F.R. § 274a.12(c)(14) (describing deferred action as "an act of administrative convenience to the government which gives some cases lower priority"); *see also Reno v.*

form of prosecutorial discretion, for an initial two-year period, which may be renewed. *See* 2012 DACA Memorandum (attached as Ex. A to Pet. (Doc. No. 1-1)). Those granted deferred action are also eligible for employment authorization. *See id.*[5]

Ms. Vargas first applied for and was granted deferred action pursuant to DACA in 2012, and she successfully renewed in 2014. Vargas Decl. ¶ 5. Her most recent grant of deferred action expired on November 11, 2016, as Ms. Vargas could not at that time afford the $465 renewal fee (which was increased in December 2016 to $495). *See id.* ¶ 8. On February 10, 2017, however, Ms. Vargas filed an application with USCIS, with the required fee, to renew her DACA once more. *Id.* ¶ 10. Ms. Vargas' DACA renewal application remains pending. *Id.*

One of Ms. Vargas' parents also filed a petition for a "U" visa in 2014 and included Ms. Vargas as a derivative child of a victim of a serious crime who has suffered mental or physical abuse and is cooperating with government officials in the investigation or prosecution of criminal activity. *See id.* ¶ 12. To the best of Ms. Vargas' knowledge, that petition is pending. *See id.*

The unlawful targeting, arrest, and detention of Ms. Vargas

On February 15, 2017, several ICE agents came to Ms. Vargas' home in Jackson, Mississippi on two separate occasions. The first time was early in the morning, when the

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Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 483-85 (1999) (explaining the development of deferred action); *cf.* 6 U.S.C. § 202(5) ("The Secretary [of DHS] shall be responsible for . . . [e]stablishing national immigration enforcement policies and priorities.").

5 *See also* 8 C.F.R. § 274a.12(a)(11) (permitting "[a]n alien whose enforced departure from the United States has been deferred in accordance with a directive from the President of the United States to the Secretary [of Homeland Security]" to seek employment authorization).

agents came and arrested Ms. Vargas' father and brother. *See id.* ¶¶ 13-15. During that encounter, Ms. Vargas helped interpret for her father, and additionally answered questions asked of her by the agents. *Id.* Ms. Vargas told the agents that she had been granted DACA, and, on their demand, showed them her identification, which they photographed. *Id.* ¶ 14. After the agents handcuffed and took her family members outside, Ms. Vargas returned to the home, locked the doors and hid in a closet for the next several hours, in fear. *Id.* ¶¶ 15-16.

Later that day, the ICE agents returned with a search warrant and broke into the home. *See id.* ¶ 16. Ms. Vargas emerged from her hiding place to find an ICE agent with a gun pointed at the ceiling, who immediately handcuffed her as the agents searched the house. *Id.* ¶ 17. While she was handcuffed, one of the ICE agents told Ms. Vargas they knew her DACA had expired. *Id.* ¶ 18. Just prior to leaving without arresting Ms. Vargas, one of the ICE agents told her that she was receiving a "hall pass." *Id.* ¶ 19.

Over the next two weeks, Ms. Vargas spoke to various media outlets about her experiences with the ICE agents on February 15. *See id.* ¶¶ 20-21. Her firsthand account gained considerable attention, both locally and more broadly.[6]

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6 *See, e.g.*, Dreher, Arielle, *After ICE Raid, Immigration Limbo in Mississippi for a Jackson Family*, JACKSON FREE PRESS, Feb. 22, 2017 (Attached as Ex. 7 to Decl. of Justin B. Cox ("Cox Decl.") (Cox Decl. attached as Ex. B); Fowler, Sarah, *Immigrant in Mississippi hides after relatives booked*, THE CLARION LEDGER, Feb. 16, 2017, (Attached as Ex. 4 to Cox Decl.); Apel, Therese, *Woman barricades herself in home after immigration raid*, THE CLARION LEDGER, Feb. 15, 2017, (Attached as Ex. 1 to Cox Decl.); Kenney, David, *Two arrested in Jackson immigration raid*, Feb. 15, 2017, MS NEWS NOW, (Attached as Ex. 3 to Cox Decl.); Frazier, Desare, *Two Workers From Argentina Await Fate Before Judge*, MPB NEWS, Feb. 16, 2017, (Attached as Ex. 6 to Cox Decl.); *Mississippi woman locks self away during immigration arrests*, THE MERIDIAN STAR, Feb. 15, 2017, (Attached as Ex. 2 to Cox Decl.); *Mississippi woman*

On or about February 24, several local organizations announced that they would be hosting a press conference at Jackson City Hall on March 1 to voice their concerns regarding recent ICE enforcement activity in Mississippi, including "reports of improper activities by ICE agents." *See* Press Release, Targeted ICE Raids Against Immigrants in Mississippi, Feb. 24, 2017 ("Press Release") (announcing date and location for press conference at the Jackson City Hall) (attached as Ex. 1 to Decl. of Bill Chandler) ("Chandler Decl.") (Chandler Decl. attached as Ex. C). Ms. Vargas was invited to speak at the press conference, along with a number of other community members. *See* Vargas Decl. ¶ 23. At the press conference, a variety of speakers denounced ICE's recent actions in Mississippi. *See id.* ¶ 25. Ms. Vargas explained that notwithstanding ICE's arrests of her father and brother, she remained committed to contributing to the United States, and implored Congress to create a path to citizenship for undocumented immigrants who came to the U.S. as children. *See id.* ¶ 26.

Immediately following the press conference, Ms. Vargas walked to a nearby parking garage and got in the passenger seat of her car, which her friend, Jordan MacAuley Sanders, began driving. *See id.* ¶ 27; Decl. of Jordan MacAuley Sanders ("Sanders Decl.") (attached as Ex. D) ¶ 5. Minutes after pulling out of the parking garage, their car was pulled over by law enforcement. Sanders Decl. ¶ 6. The officers were ICE agents, including at least one agent who had pointed his gun at Ms. Vargas' ceiling inside her home on February 15. *See* Vargas Decl. ¶ 29. That agent approached Ms. Sanders' car on the passenger side and said, to the best of Ms. Vargas' recollection: "Daniela Vargas, remember me? . . . . You know who we are, you know why we're here .

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locks self away during immigration arrests, TULSA WORLD, Feb. 15, 2017, (Attached as Ex. 5 to Cox Decl.).

. . . You're under arrest for being an illegal immigrant." *Id.*; *see also* Sanders Decl. ¶ 9 (stating that all the officers went to Ms. Vargas' door—the passenger door—and none to the driver's side). Ms. Vargas was subsequently arrested and transported to LaSalle Detention Facility in Jena, Louisiana, where she remains detained. Vargas Decl. ¶ 30.

When asked by the press to comment on Ms. Vargas' arrest, ICE released a statement confirming that she had, in fact, been "targeted" for arrest. *See, e.g.*, Samantha Schmidt, *ICE Nabs Young 'Dreamer' Applicant After She Speaks Out at a News Conference*, WASHINGTON POST, Mar. 2, 2017 (quoting an ICE spokesperson as stating that Ms. Vargas had been arrested "during a targeted immigration enforcement action") (attached as Ex. 8 to Cox Decl.).

Ms. Vargas' imminent, process-free deportation

Following Ms. Vargas' arrest, ICE officials informed her attorneys that they will remove her as an alleged Visa Waiver Program (VWP) overstay. *See Visa Waiver Program Final Administrative Removal Order* (attached as Ex. E). The VWP is a program through which nationals of designated countries may enter the country without a visa if, among other requirements, they "waive[] any right . . . to contest, other than on the basis of an application for asylum, any action for [their] removal." 8 U.S.C. § 1187(b)(2).[7] In other words, those admitted through the VWP are statutorily required to

7 *See also* 8 C.F.R. § 217.4(b)(1) ("An alien who has been admitted to the United States under the [VWP] who is determined by an immigration officer to be deportable from the United States under one or more of the grounds of deportability listed in section 237 of the [INA] shall be removed from the United States to his or her country of nationality or last residence. Such removal shall be determined by the district director who has jurisdiction over the place where the alien is found, and shall be effected without referral of the alien to an immigration judge for a determination of deportability, except that an alien who was admitted as a Visa Waiver Program visitor who applies for asylum

agree to summary removal, waiving the rights to due process that they otherwise would have when the government seeks to deprive them of such a significant liberty interest. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903) (holding that the government cannot "arbitrarily [] cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized.").

The government has yet to substantiate that Ms. Vargas waived her due process rights when she came to this country at the age of seven. Nor can it explain how, even if Ms. Vargas did execute such a waiver at that time, it believes that she could knowingly and voluntarily do so at such a young age.[8] As explained below, she could not have. The government's attempt to hold her to an alleged waiver of rights that she could not have knowingly executed would cause serious and irreparable harm to Ms. Vargas, as it would

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in the United States must be issued a Form I-863 for a proceeding in accordance with 8 CFR 208.2(c)(1) and (c)(2)."); *id.* 8 C.F.R. § 217.4(b)(2) ("Removal by the district director under paragraph (b)(1) of this section is equivalent in all respects and has the same consequences as removal after proceedings conducted under section 240 of the Act [which governs typical removal proceedings].").

8 On March 1, 2017, DHS provided Ms. Vargas—but not her designated counsel—with a VWP Notice of Intent to Issue a Final Administrative Removal Order and a VWP Final Administrative Removal Order in which DHS alleges that Ms. Vargas personally waived her right to a hearing to contest her removal. However, DHS has failed to produce any evidence that Ms. Vargas personally executed such a waiver. *See Notice of Intent to Issue a Final Administrative Removal Order,* (ICE Form 71-058) (Ex F).

preclude her from benefiting from two applications for immigration relief that remain pending with USCIS, to say nothing of other relief to which she may be entitled.[9]

Ms. Vargas filed a habeas petition on March 6, 2017, alleging that the ICE agents' targeting, arrest, detention, and imminent removal of her violates her rights under the First and Fifth Amendments to the U.S. Constitution, as well as the Administrative Procedure Act. She requests here that the Court grant her an emergency stay of her imminent, unlawful deportation to a country she barely remembers and to which she fears returning, so the Court can consider her petition in an orderly manner and maintain its ability to order meaningful relief.

LEGAL STANDARD

Ms. Vargas' motion for a stay of removal is governed by the "the traditional test for stays," *Nken v. Holder*, 556 U.S. 418, 433 (2009) (citation and quotation marks omitted), which requires consideration of four factors:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). Pursuant to the traditional test for stays, courts balance the four factors, such that a stay is warranted even if absent a strong likelihood of success on the merits, so long as the petitioner can demonstrate "a substantial case on the merits" and the other factors tip sharply in her favor. *Hilton*, 481 U.S. at 778; *cf. Indiana State Police Pension Trust v. Chrysler LLC*,

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9 Ms. Vargas is afraid to be returned to Argentina, but since she has been in ICE custody, no immigration officer has asked her if she is afraid to return to there. *See* Vargas Decl. ¶ 37.

556 U.S. 960, 960 (2009) (per curiam) ("[I]n a close case it may be appropriate to balance the equities, to assess the relative harms to the parties, as well as the interests of the public at large.") (citation and quotation marks omitted).

At bottom, a stay of removal is "'an exercise of judicial discretion,' and '[t]he propriety of its issue is dependent upon the circumstances of the particular case.'" *Nken*, 556 U.S. at 432 (citation omitted, alteration in original).

ARGUMENT

I. MS. VARGAS IS LIKELY TO SUCCEED ON THE MERITS OF HER CLAIMS

Ms. Vargas' habeas petition alleges several claims against Respondents: three arise under the Due Process Clause of the Fifth Amendment; one under the First Amendment; and one under the Administrative Procedure Act ("APA"). As set forth below, Ms. Vargas has a sufficient likelihood of success on all her claims to justify a stay of removal.

A. Ms. Vargas is likely to prevail on her procedural due process claims.

Ms. Vargas is likely to succeed in her claims that Respondents' detention and attempts to deport her summarily—both of which plainly implicate constitutionally protected liberty interests, *see, e.g.*, *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953)—violate her due process rights. *See* Pet. ¶¶ 39-64. Respondents' actions in continuing to detain Ms. Vargas without bond and attempting to remove her summarily are premised on the notion that, by allegedly entering the country through the VWP, she personally waived the process that Respondents would otherwise be required to provide her. Respondents' premise, however, is both factually and legally erroneous.

As a threshold matter, several propositions cannot be seriously disputed. First, due process rights can be waived. *See, e.g., Boddie v. Connecticut*, 401 U.S. 371, 378-379 (1971) (waiver of right to hearing). Second, the VWP erects a statutory mechanism through which non-citizens can waive their own due process rights. *See* 8 U.S.C. § 1187(b)(2) ("An alien may not be provided a waiver under the program unless the alien has waived any right . . . to contest, other than on the basis of an application for asylum, any action for removal of the alien."). Third, absent a valid waiver via the VWP, non-citizens such as Ms. Vargas have the constitutional right to a hearing before an immigration judge prior to being removed. *See, e.g., Nose*, 993 F.2d at 78-79; *Galluzzo v. U.S. Att'y Gen*, 633 F.3d 111, 114 (2d Cir. 2011); *Bavo v. Napolitano*, 593 F.3d 495, 502-03 (7th Cir. 2010) (en banc); *Mokarram v. U.S. Att'y Gen*, 316 F. App'x 949, 952-53 (11th Cir. 2009). Fourth, any waiver of due process rights "must be made knowingly and voluntarily." *Nose*, 993 F.2d at 79.

To determine whether a waiver is knowing and voluntary, the Fifth Circuit considers the following factors: "(1) the party's background and experience; (2) the clarity of the written waiver agreement; and (3) whether the party was represented by or consulted with an attorney." *Nose*, 993 F.2d at 79. "In determining whether a waiver is knowing and voluntary," moreover, courts "must 'indulge in every reasonable presumption against a waiver.'" *Id.* (quoting *Brewer v. Williams*, 430 U.S. 387, 404 (1977)).

Ms. Vargas did not execute a valid waiver of rights under the VWP for one obvious reason: at the time the alleged waiver took place, Ms. Vargas was seven years-old. Even if *some* minors, in *some* circumstances, could execute a knowing and

voluntary waiver of constitutional rights, the idea that a seven year-old non-citizen could knowingly and intelligently waive her constitutional right to contest her possible future deportation from the United States fails on its face.

As the Supreme Court noted in *Bellotti v. Baird*, "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." 443 U.S. 622, 635 (1979). In the immigration context in particular, "minors generally cannot appreciate or navigate the rules of or rights surrounding final proceedings that significantly impact their liberty interests." *Flores-Chaves v. Ashcroft*, 362 F.3d 1150 (9th Cir. 2004); *see also In re Gault*, 387 U.S. 1, 33-34 (1967); Dree K. Collopy, *No Minor Issue: The Diminished Capacity of Minors in Our Immigration System*, 12-04 IMMIGR. BRIEFINGS (Apr. 2012). An alleged waiver by a seven year-old simply cannot be accepted at face value, particularly given that courts are to "indulge in every reasonable presumption against" finding such a waiver. *Nose*, 993 F.2d at 79 (citation omitted); *cf. id.* (VWP waiver held to be knowing and voluntary because the non-citizen was a highly educated adult who had passed English language exams, and therefore could easily read the clear language of the waiver, and she had also consulted with an attorney specifically about the VWP prior to signing the waiver and entering the United States); *Willingsworth*, 319 F.3d at 959 (VWP waiver held to be knowing and voluntary because the non-citizen was a frequent traveler and business owner with a high school education who had the assistance of an immigration consulting service to address any of her concerns about the VWP prior to leaving her native country of Sweden).

Even assuming that a seven year-old *can* knowingly and voluntarily execute a VWP waiver of rights, Respondents have yet to produce any evidence that Ms. Vargas executed a waiver *at all* when she came to the United States in 2001.[10] Respondents have produced no documents and given no explanations, notwithstanding that it is the government's responsibility to do so. *See, e.g.*, *Mokarram*, 316 F. App'x at 953 (rejecting the government's contention that the court should presume a waiver where the non-citizen entered through the VWP, explaining that, "[t]he responsibility of demonstrating the waiver of such the right to due process rests on [the government], for this Court will not presume a waiver of such a fundamental constitutional [right] where the record is silent"); *see also Galluzo*, 633 F.3d at 115 (citing *Mokarram* for the proposition that "[i]t would be unreasonable for this Court to conclude that waiver occurred in the absence of anything more than the entry-*ergo*-waiver logic offered by [the government]").

Finally, neither Ms. Vargas nor her parents consulted with or were represented by an attorney at the time that DHS claims that Ms. Vargas allegedly executed her waiver of rights under the VWP. *See Nose*, 993 F.2d at 79 (identifying as the third factor for determining if a waiver was knowing and voluntary whether the party consulted with or was represented by an attorney). This further underscores the fact that at the time Ms. Vargas allegedly executed the waiver, when she was seven years-old, she could not have done so knowingly and intelligently.

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10 As noted in footnote 8, supra, although DHS has attempted to effectuate a final administrative removal order based on its allegation that Ms. Vargas personally waived her right to a hearing, DHS has provided no actual evidence to substantiate this to either Ms. Vargas or to her designated counsel.

Ms. Vargas has plainly been prejudiced, and will be prejudiced to an even greater degree in the future, if the Respondents continue to deny her the due process to which she is entitled based on a waiver of rights that, if it occurred at all, was legally invalid. *See Ripley v. Chater*, 67 F.3d 552, 557 n.22 (5th Cir. 1995) (explaining that establishing prejudice requires showing that the outcome "might" have been different but for the alleged violation). Here, had Ms. Vargas instead been referred to an Immigration Judge for proceedings under Section 240 of the INA, she would likely already be out of detention on bond. In those proceedings, moreover, she would also have the opportunity to ask for a delay of final adjudication pending the outcome of her pending DACA renewal application. Ms. Vargas would therefore not be at imminent risk of deportation at all, because her DACA renewal application would likely be granted well before the removal proceedings would begin; and, if her DACA renewal were granted, she would have a basis to remain in the country and to administratively close any removal proceedings. Even absent a renewal of her DACA, Ms. Vargas would be able to request continuances and administrative closure while her parent's U visa application remains pending. Ms. Vargas would have been eligible, at a minimum, for voluntary departure, which would at least permit her to put her affairs in order—disposing of property, packing the rest, saying her goodbyes, etc.—prior to being removed, and to avoid the severe consequences of a final order of removal. Regardless of the ultimate outcome of those proceedings, there can be no doubt that they "might" result in a different outcome than what Ms. Vargas faces here—continued detention and summary removal. *Ripley*, 67 F.3d at 557 n.22.

Respondents continue to detain and seek to summarily deport Ms. Vargas based on a waiver of rights that may not have occurred and would not be valid even if it did, and to her substantial prejudice. Ms. Vargas is therefore likely to succeed on her claims that Respondents are violating her rights to procedural due process.

B. Ms. Vargas is likely to succeed on her First Amendment claim.

Ms. Vargas is also likely to prevail on her claim that Respondents' arrest and detention of her constitutes unconstitutional retaliation against her for exercising her right to freedom of speech protected by the First Amendment. ICE arrested and detained Ms. Vargas after she spoken to the press on several occasions about the ICE raid on her home and the fear she felt. ICE followed her from a press conference where she spoke about her family's experience and her desire to remain in the country and detained her within minutes of the highly public event.

The First Amendment not only protects freedom of speech; it also prohibits adverse government action in retaliation for exercising that right. *See Izen v. Catalina*, 398 F.3d 363, 367 (5th Cir. 2005) (quoting *Colson v. Grohman*, 174 F.3d 498, 508 (5th Cir. 1999)). When retaliating against speech, the government "chills the exercise of First Amendment freedoms and thereby indirectly produces a result that the government cannot command directly." *Colson*, 174 F.3d at 509 (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

To succeed on a First Amendment retaliation claim, Ms. Vargas must establish that "(1) [she was] engaged in constitutionally protected activity, (2) the defendants' actions caused [her] to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the defendants' adverse actions were

substantially motivated against the plaintiffs' exercise of constitutionally protected conduct." *Izen*, 398 F.3d at 367 (quoting *Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002)). Ms. Vargas meets all three elements.

i. *Ms. Vargas engaged in First Amendment protected activity by publicly and repeatedly criticizing ICE's enforcement actions against her family and other similar non-citizens*.

The First Amendment of the United States Constitution protects the right to freedom of speech from government interference. *See* U.S. CONST. Amend. I. The First Amendment demonstrates a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Snyder v. Phelps*, 562 U.S. 443, 452 (2010) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Indeed, speaking out on public issues "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder*, 562 U.S. at 453 (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)). Speech deals with public issues when it can "be fairly considered as relating to any matter of political, social, or other concern to the community," *Snyder*, 562 U.S. at 453, or when it "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public," *San Diego v. Roe*, 543 U.S. 77, 83–84 (2004). Speech that includes criticism of law enforcement practices is entitled to vigorous First Amendment protection. *See City of Houston, Tex. v. Hill*, 482 U.S. 451, 462–63 (1987) ("The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.").

By publicly sharing her family's plight in the face of ICE's enforcement activities, Ms. Vargas was engaging in "uninhibited, robust, and wide-open" debate on a pressing matter of political and social concern to the community: immigration enforcement actions

by ICE and how such actions affect families.[11] Speech of this nature "lies at the heart of the First Amendment" which was created to ensure an "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Lane v. Franks*, 134 S. Ct. 2369, 2377 (2014).

In First Amendment cases, the appropriate inquiry "is not whether [the plaintiffs] 'have' First Amendment rights . . .. Instead, the question must be whether [the government] abridges expression that the First Amendment was meant to protect." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776 (1978). Ms. Vargas' non-citizen status does not exclude her from First Amendment protection. *See Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (holding that "[f]reedom of speech and of press is accorded aliens residing in this country"); *Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1064 (9th Cir. 1995) (recognizing First Amendment rights of non-citizens facing deportation); *In re Alien Children Ed. Litig.*, 501 F. Supp. 544, 560 (S.D. Tex. 1980) ("Congressional power to exclude aliens does not imply state power to infringe the rights of undocumented persons within this jurisdiction to receive and to exchange ideas.").

Persons in the United States, including non-citizens, enjoy the "right to peaceful expression of views through public demonstration." *Parcham v. I.N.S.*, 769 F.2d 1001, 1004 (4th Cir. 1985); *see also Bridges*, 326 U.S. at 146-49 (discussing First Amendment problems in interpreting a deportation statute to authorize the deportation of a non-citizen residing in the United States based on "cooperation with Communists for the purposes of

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[2] Immediately after the ICE raid at her home, Ms. Vargas spoke out publicly about her family's story and shared that she was "terrified" and "scared to go home" after her father and brother's arrest. *See* Cox Decl. ¶¶ 2-8

wholly lawful objectives"); *Am.-Arab Anti-Discrimination Comm.*, 70 F.3d at 1064 ("It is thus especially appropriate that the First Amendment principle of tolerance for different voices restrain our decisions to expel a participant in that community from our midst.").

Here, as a direct result of engaging in protected speech, Ms. Vargas was targeted by ICE officers, arrested, detained, and faces imminent removal from the country where she has resided for over 15 years. This is despite the fact that, as a DACA recipient she is categorically within a low priority for deportation. Indeed, before Ms. Vargas spoke out about ICE enforcement and immigration policy concerns, ICE gave her a "hall pass" during its raid on her home by declining to take her into custody. But after Ms. Vargas was quoted in the press criticizing ICE enforcement—and within minutes of Ms. Vargas' departure from a press conference where she had been continuing to speak publicly on these issues—ICE arrested her. The only difference between Ms. Vargas' situation following her encounter with ICE on February 15 and her subsequent arrest and detention on March 1, is Ms. Vargas' active and public criticism of ICE.

ii. *ICE's actions caused injury and would deter a person of ordinary firmness from speaking out publicly against ICE.*

Retaliation for protected speech is a violation of the First Amendment "if it is capable of deterring a person of ordinary firmness from further exercise his constitutional rights." *Morris v. Powell*, 449 F.3d 682, 686 (5th Cir. 2006); *Keenan v. Tejada*, 290 F.3d 252, 259 (5th Cir. 2002); *but see Mendocino Environmental Ctr. v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999) ("[I]t would be unjust to allow a defendant to escape liability for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity."); *Smith v. Plati*, 258 F.3d 1167, 1177 (10th Cir. 2001) ("The focus . . . is upon whether a person of ordinary firmness would be chilled,

rather than whether the particular plaintiff is chilled."). This test "is intended to weed out only inconsequential actions and is not a means to excuse more serious retaliatory acts." *Morris*, 449 F.3d at 686. The key question is whether the "retaliatory conduct that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights constitutes an adverse action." *Bennett v. Hendrix*, 423 F.3d 1247, 1250-51 (11th Cir. 2005); *see also Keenan*, 290 F.3d at 258; *Washington v. County of Rockland*, 373 F.3d 310, 320 (2d Cir. 2004).

Retaliation in the form of arrest, detention, and summary removal has traumatized Ms. Vargas and would chill any person of ordinary firmness from continuing to engage in free speech. *Cf. Bridges*, 326 U.S. at 147 ("[D]eportation may result in the loss of all that makes life worth living.") (internal quotation omitted); *see also Keenan*, 290 F.3d at 259 (recognizing chilling effect of prolonged detention by police). Ms. Vargas is a young immigrant who had just lived through the traumatic experience of witnessing ICE raid her home and arrest her family members who was then arrested and detained after speaking out about it. ICE's actions toward Ms. Vargas would chill a a reasonable person from further exercising their First Amendment rights in this context. Notably, the chilling effect may go beyond Ms. Vargas in this case.[12]

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12 As the media has reported, young immigrants in similar circumstances may see Petitioner's retaliatory arrest, detention and imminent deportation as a warning sign. *See, e.g.*, Hing, Julianne, *Daniela Vargas's Detention Shows How Vulnerable DREAMers Are Under Trump*, THE NATION, Mar. 2, 2017 (attached as Ex. 9 to Cox Decl.); Hauser, Christine, *A Young Immigrant Spoke Out About Her Deportation Fears. Then She Was Detained*," N.Y. TIMES, Mar. 2, 2017 (attached as Ex. 10 to Cox Decl.). The workplace context provides additional evidence of the chilling effect immigration-related retaliation can have on whole sectors of society. Due to fear of immigration-related retaliation, immigrants are more likely to be subject to workplace abuses, yet less likely to report those abuses, leading to magnified undesirable consequences for workplace settings

iii. *Petitioner's arrest and detention by ICE was substantially motivated as a way to deter her and other non-citizens from speaking out publicly against ICE.*

"An action motivated by retaliation for the exercise of a constitutionally protected right is actionable, even if the act, when taken for a different reason, might have been legitimate." *Woods v. Smith*, 60 F.3d 1161, 1165 (5th Cir. 1995); *see also Mt. Healthy City School District Bd. of Education v. Doyle*, 429 U.S. 274 (1977); *Jackson v. Cain*, 864 F.2d 1235 (5th Cir. 1989). The central question is whether the actual motivation for the government's actions was retaliatory. *Id*. In this case, the motive for Ms. Vargas' arrest and detention was retaliatory. ICE's arrest of Ms. Vargas was intended to silence her criticism of government activities she disagreed with and was harmed by: ICE immigration enforcement policies and actions. While ICE could have arrested her before and in fact declined to do so when the same officers encountered her two weeks before, it was only after Ms. Vargas' public criticism of ICE's raid at her home and expressing fear of ICE enforcement that ICE acted to arrest and detain her. In cases such as this, when the government tries to silence speech about its own activities, the First Amendment demands strong protection. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015) (quoting *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994)) ("[F]avoring some speakers over others demand[s] strict scrutiny when the [] speaker preference reflects a content preference.").

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across the country. *See, e.g.*, *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1065 (9th Cir. 2004) ("Indeed, were we to direct district courts to grant discovery requests for information related to immigration status in every case involving national origin discrimination under Title VII, countless acts of illegal and reprehensible conduct would go unreported."); *Labriola Baking Co.*, 361 NLRB No. 41, at *2 (Sept. 8, 2014) (noting that "threats touching on employees' immigration status warrant careful scrutiny" because "they are among the most likely to instill fear among employees.").

C. Ms. Vargas is likely to succeed on her APA claim.

Ms. Vargas is also likely to succeed on her claim that DHS' actions in detaining her were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; and without observance of procedure required by law, in violation of violate the Administrative Procedure Act (APA), 5 U.S.C. §§ 706(2)(A)-(D).

Under the APA, the Court The scope of this Court's review is delineated by 5 U.S.C. § 706, which provides that the "reviewing court *shall* . . . hold unlawful and set aside agency action . . . found to be "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; . . . [or] (D) without observance of procedure required by law . . .." 5 U.S.C. § 706(2) (emphasis added). The APA provides further that, "[t]o the extent necessary to decision and when presented, the reviewing court *shall* decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." *Id.* § 706 (emphasis added). Under the APA, this Court reviews errors of law *de novo*, without deference to the agency's conclusions. *Inst. for Tech. Dev. v. Brown*, 63 F.3d 445, 450 (5th Cir. 1995).

Ms. Vargas is likely to succeed on her APA claim for reasons already explained above. DHS detained Ms. Vargas pursuant to unconstitutional retaliation for her exercise of her rights to free speech protected by the First Amendment, and in violation of the Due Process Clause of the Fifth Amendment. DHS' actions were therefore "contrary to

constitutional right, power, privilege, or immunity," in violation of 5 U.S.C. § 706(2)(B). Similarly, in seeking to deport Ms. Vargas without giving her the opportunity to contest her removal before an immigration judge, DHS has violated procedural requirements of the Fifth Amendment and the Immigration and Nationality Act, and therefore should be set aside under § 706(2)(D) of the APA, which prohibits agency action taken "without observance of procedure required by law." Finally, and for the reasons already discussed, DHS' actions must be set aside as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also State of La., ex rel. Guste v. Verity*, 853 F.2d 322, 327 (5th Cir. 1988) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)).

II. WITHOUT A STAY OF REMOVAL, MS. VARGAS FACES IRREPARABLE HARM

Along with the likelihood of success on the merits, the irreparable injury inquiry is one of "the most critical" factors in adjudicating stay applications. *Nken*, 556 U.S. at 433. Without a stay of removal, Ms. Vargas will suffer irreparable harm for three main reasons: (1) her near certain return to Argentina, a country that is completely unfamiliar to her, and to which she fears returning, which will separate her from her mother, her friends, and her support network, cause her significant economic hardship, and cut short her current educational path; (2) the inability effectively to communicate with counsel and to pursue her claim for relief from outside of the United States; and (3) the curtailment of her First Amendment right to engage in protected speech due the highest level of Constitutional protection and the exacerbation of the resulting chilling effect on her and others' speech as a result of her removal.

First, if Ms. Vargas is not granted a stay of removal, she faces imminent return to Argentina, a country that is completely unfamiliar to her, as she has not lived in or even visited it she first arrived in the United States nearly 16 years ago, when she was only seven years old. Vargas Decl. ¶ 3. Having spent the vast majority of her life in the United States, it is the only country that she has known as her home. *Id.* ¶ 4. Removal from the United States will separate her from her mother, her friends, and her entire network of support. *Id.* ¶ 33. *See Leiva-Perez v. Holder*, 640 F.3d 962 (9th Cir. 2011) (holding that "'important [irreparable harm] factors include separation from family members, medical needs, and potential economic hardship") (citation omitted); *see also Jimenez v. Napolitano*, 2012 WL 3144026 (N.D. Cal. 2012) (same).

Ms. Vargas fears facing severe economic hardship if she is removed to Argentina. Vargas Decl. ¶ 35. She lacks any friends in Argentina, and although she has some family members there, she has not seen any of them since she was a young child. *Id* Moreover, the family members that reside there are very poor and thus would be able to provide Ms. Vargas with little, if any, financial support. *Id*. Ms. Vargas' fears of economic hardship are exacerbated by the fact that she speaks only basic Spanish and would need to take Spanish lessons—which she could not afford—simply to live and to work. *Id*. ¶ 36. Her lack of fluency would thus likely impede her ability to find employment, amplifying the economic hardship she would experience if removed. *Id*.

Removal will also cut short Ms. Vargas' distinguished educational career. After graduating ninth in her class from Morton High School with a 3.77 grade point average and continuing her education at East Central Community College (on scholarship) and the University of Southern Mississippi, Ms. Vargas has sought to continue her education,

in the hopes of one day becoming a math professor. Vargas Decl. ¶ 35. If Petitioner were returned to Argentina, she would likely be compelled, based in part of her inability to speak academic Spanish, to begin her college education over again. *Id.* In addition, Petitioner has expressed fear of returning to Argentina. The unique confluence of circumstances in Ms. Vargas' life, as explained above, mean that removal to Argentina would cause her irreparable harm. *See Hilton v. Braunskill*, 481 U.S. 770, 777 (1987) (noting that "[t]he traditional stay factors contemplate individualized judgments in each case"); *see also, e.g.*, *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) ("We have long recognized that deportation is a particularly severe 'penalty'" (citation omitted)); *Bridges v. Wixon*, 326 U.S. 135, 147 (1945) ("[I]t must be remembered that although deportation technically is not criminal punishment, it may nevertheless visit as great a hardship as the deprivation of the right to pursue a vocation or a calling. As stated by Mr. Justice Brandeis speaking for the Court in *Ng Fung Ho v. White*, 259 U.S. 276, 284 [(1922)], deportation may result in the loss 'of all that makes life worth living.'" (citations omitted)).[13]

If she is removed, Ms. Vargas will experience extreme difficulty in pursuing her claim to remain in the United States. Removal will severely hinder her counsel's ability to communicate with her, to gather pertinent facts and evidence, and otherwise to develop her case and to adequately represent her. *See Kahn v. Elwood*, 232 F. Supp. 2d 344, 351 (M.D. Penn. 2002) (finding, in context of irreparable injury analysis for purposes of a

13 It is notable that, in this case, the severe harm posed by removal is not legally inevitable—Ms. Vargas has a currently pending DACA renewal application, as well as a U visa petition as a derivative of her parent, and may well be officially allowed to stay in the United States.

stay, that "Petitioner's access to his counsel during the pendency of his appeal is invaluable" since "Petitioner may possess information relevant to his appeal that would not be accessible if he were half-way around the globe").

Finally, as described above, ICE's arrest and detention of Ms. Vargas was based on unconstitutional retaliation against her for exercising her right to freedom of speech on public issues—speech that "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder*, 562 U.S. at 453. The Supreme Court has recognized that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Opulent Life Church v. City of Holly Springs*, 697 F.3d 279 (5th Cir. 2012) (same). Here, Ms. Vargas has clearly suffered such a deprivation, as she had spoken to reporters after ICE raided her home and detained her brother and her father and was arrested by ICE agents immediately after departing a press conference at which she had spoken publicly about how ICE enforcement actions had separated her family. Her arrest and detention have severely curtailed her overall ability to engage in protected First Amendment activities. Ms. Vargas' arrest and detention have resulted in a chilling effect not only on her own protected First Amendment activities, but will likely chill other immigrants from speaking on similar public issues of ICE enforcement tactics for fear of similar retaliation. *See* Ex. 9, 10 to Cox Decl. Were Ms. Vargas to be removed while her claims are pending, her ability to engage in protected speech would be further undermined and the chilling effect on her and on immigrants who are present in the United States would be dramatically amplified. The significant First Amendment interests at stake here and the extraordinary and unusual effects that removal would have

on those interests weigh strongly in favor of granting a stay of removal.

III. THE ISSUANCE OF A STAY WILL NOT SUBSTANTIALLY INJURE THE GOVERNMENT, AND STAYING MS. VARGAS' REMOVAL IS IN THE PUBLIC INTEREST

The Court in *Nken* found that the last two stay factors, injury to other parties in the litigation and the public interest, merge in immigration cases because Respondent is both the opposing litigant and the public interest representative. *Nken*, 556 U.S. at 435. The Court also noted that the interest of Respondents and the public in the "prompt execution of removal orders" is heightened where "the alien is particularly dangerous" or "has substantially prolonged his stay by abusing the process provided to him." *Id.* at 436 (citations omitted). Here, neither of these factors, nor any other factors, exist to suggest that the Respondents or the public have any interest in Ms. Vargas' removal.

Ms. Vargas is assuredly not a danger to the public. She has never been arrested before (and still has never been arrested or charged with a criminal offense), and has twice passed the background checks undertaken pursuant to her application for and renewal of DACA. Nor has Ms. Vargas prolonged her stay by abusing any process provided to her. And while the public has an interest in the "prompt" execution of removal orders, Respondents seek to remove Ms. Vargas in a manner that violates her right to due process as well as her free speech rights under the First Amendment, which heightens the public interest in ensuring that she is not wrongfully removed. *See Nken*, 556 U.S. at 436 ("Of course there is a public interest in preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm.").

Respondent cannot make any particularized showing that staying Ms. Vargas'

removal while the Court considers her habeas petition would substantially injure its interests or conflict with the public interest in preventing a wrongful removal, such that the third and fourth *Nken* factors would outweigh the hardship Ms. Vargas would face if removed.

CONCLUSION

For the reasons stated above, Ms. Vargas respectfully requests that the Court grant her an emergency stay of removal.

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Respectfully submitted,

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