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8
9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**

11 NESTER PAUL HERNANDEZ-MORALES,

12
13 Petitioner,

14 v.

15 PAM BONDI, Attorney General of the United
16 States, in her official capacity; KRISTI
17 NOEM, Secretary of the U.S. Department of
18 Homeland Security, in her official capacity;
19 TODD LYONS, Acting Director of U.S.
20 Immigration and Customs Enforcement, in his
21 official capacity; PATRICK DIVVER, ICE
Field Office Director for San Diego County,
in his official capacity,

22 Respondents.
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Case No.: 25-cv-02551-BJC-MMP

**RESPONDENTS' RESPONSE IN
OPPOSITION TO PETITIONER'S
HABEAS PETITION AND
APPLICATION FOR
TEMPORARY RESTRAINING
ORDER**

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11 **I. INTRODUCTION**

Petitioner seeks a temporary restraining order to enjoin “Respondents from executing Petitioner’s removal until the Board of Immigration Appeals adjudicates his pending motion to reopen.” ECF No. 2-1 at 24. His underlying habeas petition requests the Court to issue a writ for the same. The Ninth Circuit has unequivocally held, however, that judicial review over Petitioner’s exact request is barred by 8 U.S.C. § 1252(g). In addition, the Court cannot exercise jurisdiction over the petition because Petitioner has failed to name the proper respondent. Because the Court lacks jurisdiction over Petitioner’s claims and requests for relief, the Court must deny his request for interim relief and dismiss the petition.

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22 **II. FACTUAL AND PROCEDURAL BACKGROUND**

Petitioner is a citizen and national of El Salvador. Exh. 1 at 1.¹ He has been removed on several prior occasions and has repeatedly re-entered the United States, including on June 2, 1999. *See id.*; Exh. 2 at 2, 10–11.

On January 16, 2003, the Department of Homeland Security (DHS) served Petitioner with a Notice to Appear, charging him with inadmissibility under section 212(a)(6)(A)(i) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(a)(6)(A)(i), as an alien present in the United States who has not been admitted or paroled. Exh. 1. On May 24, 2004, an Immigration Judge (IJ) found Petitioner removable as charged, denied his applications for relief, and ordered him removed to El Salvador. Exh. 2. On October 19, 2005, the Board of Immigration Appeals (BIA) affirmed the IJ’s decision. Exh. 3.

Petitioner later filed a Petition for Review (PFR) of the BIA’s decision with the Ninth Circuit Court of Appeals. The Ninth Circuit denied the PFR on June 8, 2012, and issued its formal mandate on August 1, 2012, thereby rendering Petitioner’s order of removal final and executable. *See* Exh. 4.

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28 ¹ The attached exhibits are true copies of documents obtained from ICE counsel, with limited redactions to protect against unauthorized disclosures of personally identifiable information that federal agencies maintain under the Privacy Act, 5 U.S.C. § 552a.

1 On May 14, 2025, ICE arrested Petitioner, and he was booked into the San Diego
2 Metropolitan Correction Center (MCC) for potential criminal prosecution for illegal
3 re-entry.² *See* Exh. 5 at 2–4. On May 28, 2025, Petitioner was released from MCC and
4 transferred to ICE custody at Otay Mesa Detention Center (OMDC) for purposes of
5 executing his final order of removal to El Salvador. *See id.* at 5. Petitioner has remained
6 detained in ICE custody pursuant to 8 U.S.C. § 1231(a).

7 On June 20, 2025, Petitioner filed a motion to reopen his removal proceedings
8 with the BIA and a request to stay removal while the motion is pending. *See* ECF Nos.
9 1 at ¶ 3; 2-1 at 10; 3 at 13. On June 23, 2025, the BIA denied Petitioner’s stay request.
10 ECF No. 3 at 4. That same day, Petitioner filed a PFR and motion for stay in the Ninth
11 Circuit, which afforded a temporary stay of removal until the Ninth Circuit dismissed
12 the case as premature on September 24, 2025. *See* ECF No. 1 at ¶ 43. During this time,
13 ICE was preparing to execute Petitioner’s removal order to El Salvador, which entailed
14 transferring him to a facility in Louisiana. Prior to the Ninth Circuit’s stay being lifted,
15 ICE transferred Petitioner back to OMDC, where he remains presently detained.

16 On September 26, 2025, Petitioner filed a habeas petition in district court seeking:
17 (1) an order barring removal from the United States until the BIA rules on his pending
18 motion to reopen, (2) preserving the stay for seven days if the motion is denied, and (3)
19 enjoining Respondents from transferring him out of the Southern District of California
20 during the pendency of this action.³ *See* ECF No. 1 at ¶ 8. On September 29, 2025,
21 Petitioner filed an emergency application for a temporary restraining order to prevent
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23 ² Petitioner represents that he “was detained on June 18, 2025, when he appeared in
24 good faith for a scheduled adjustment-of-status interview at the USCIS San Diego Field
25 Office.” ECF No. 1 at ¶ 33; *see* ECF No. 2-1 at 10 (same). Respondents have found no
26 record of Petitioner being booked into custody or appearing for a USCIS interview on
27 June 18, 2025. ICE records reflect that he was arrested on May 14, 2025, booked into
MCC, and transferred to OMDC two weeks later. *See* Exh. 5 at 2–5.

28 ³ Without waiving jurisdictional or other defenses, ICE agrees not to transfer Petitioner
out of this District during the pendency of the underlying habeas petition.

1 DHS from immediately executing his removal order. *See* ECF No. 2-1 at 7. The Court
2 then ordered Respondents to file a response to Petitioner’s request for interim relief. *See*
3 ECF No. 4.

4 III. ARGUMENT

5 By seeking the Court’s exercise of jurisdiction over his habeas petition, Petitioner
6 invites reversible error. Even if the Court assumed jurisdiction, Petitioner cannot show
7 a likelihood of success on the merits of his petition because his claims and requests for
8 relief are unequivocally foreclosed by Ninth Circuit precedent. Thus, the Court must
9 deny Petitioner’s request for interim relief and dismiss his habeas petition.

10 A. The Court lacks jurisdiction because Petitioner failed to name the proper 11 respondent in a habeas petition.

12 A district court lacks jurisdiction over a habeas petition where a petitioner
13 challenges his “present physical confinement” but fails “to name their immediate
14 custodian, the warden of the facility where they are detained, as the respondent to their
15 petition.” *Doe v. Garland*, 109 F.4th 1188, 1197 (9th Cir. 2024). Thus, a petitioner’s
16 “failure to name the Facility Administrator [as a Respondent] renders the district court’s
17 exercise of jurisdiction erroneous.” *Id.* at 1194–95. Naming a variety of other federal
18 officers or agencies does not cure this defect. *Id.*

19 According to his petition, Petitioner invokes this Court’s habeas jurisdiction
20 “under 28 U.S.C. §§ 2241(c)(3) and 2243 because Petitioner is in custody within the
21 Southern District of California and challenges the legality of that custody and the
22 imminent execution of a removal order.” ECF No. 1 at ¶ 9. Petitioner, however, failed
23 to name as the respondent his immediate custodian—the warden of OMD. *See* 109
24 F.4th at 1197. Because Petitioner “challenges the legality of [his] custody,” ECF No. 1
25 at ¶ 9, but failed to name the proper respondent in such a habeas petition, the Court
26 lacks jurisdiction over, and must dismiss, this petition.⁴

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28 ⁴ Petitioner’s two claims for declaratory relief and injunctive relief are improper causes
of action. *See Corrales v. Dutschke*, 760 F. Supp. 3d 1053, 1064 (S.D. Cal. 2024).

1 **B. Petitioner’s claim arises from the government’s discretionary decision to**
2 **execute his removal order and is thus barred by 8 U.S.C. § 1252(g).**

3 Petitioner bears the burden of establishing that this Court has subject matter
4 jurisdiction over his claims. *See Kokkonen v. Guardian Life Ins. Co. of Am.*,
5 511 U.S. 375, 377 (1994) (“Federal courts are courts of limited jurisdiction. . . . It is to
6 be presumed that a cause lies outside this limited jurisdiction, and the burden of
7 establishing the contrary rests upon the party asserting jurisdiction.”). Petitioner cannot
8 overcome the jurisdiction-stripping provision of 8 U.S.C. § 1252(g).

9 Section 1252(g) bars judicial review over any claim or cause of action arising
10 from the decision or action to commence or adjudicate removal proceedings or execute
11 removal orders. *See* 8 U.S.C. § 1252(g). These three acts “represent the initiation or
12 prosecution of various stages in the deportation process” and there was “good reason
13 for Congress to focus special attention upon, and make special provision for” them.
14 *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999). “Section
15 1252(g) was directed against a particular evil: attempts to impose judicial constraints
16 upon prosecutorial discretion.” *Id.* at 485 n.9.

17 Here, Petitioner’s habeas petition and motion for temporary restraining order
18 seek an order (1) barring removal until the BIA rules on the pending motion to reopen
19 and (2) preserving the stay of removal for seven days if the motion is denied. *See* ECF
20 Nos. 1 at ¶ 8; 2-1 at 24. Petitioner’s request for an order limiting when Respondents can

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22 “Declaratory and injunctive relief are remedies, not cause of action.” *Ajetunmobi v.*
23 *Clarion Mortg. Capital, Inc.*, 595 F. App’x 680, 684 (9th Cir. 2014). To the extent
24 Petitioner’s claims are interpreted as being asserted under the Administrative
25 Procedure Act (APA), *see* ECF No. 1 at ¶ 49, such relief is not properly sought
26 through a habeas petition. *See generally Flores-Miramontes v. INS*, 212 F.3d
27 1133, 1140 (9th Cir. 2000) (distinguishing between judicial review of
28 agency actions governed by the Administrative Procedure Act and habeas
petitions brought directly in district court to challenge illegal confinement). Even if
the Court considered Petitioner’s passing references to the APA, by its own terms,
the APA does not apply “to the extent that . . . statutes preclude judicial review.” 5
U.S.C. § 701(a)(1). And as discussed below, 8 U.S.C. § 1252(g) bars judicial
review here.

1 execute his removal order is a clear attempt to impose judicial restraints upon
2 prosecutorial discretion. Indeed, Petitioner’s petition itself makes clear that his claims
3 arise from the government’s discretionary decision, and acts taken, to promptly execute
4 his removal order. *See* ECF No. 1 at ¶¶ 6, 48 (alleging that “Respondents’ plan to
5 execute Petitioner’s 2012 removal order while his statutory motion to reopen remains
6 pending before the Board of Immigration Appeals constitutes unlawful imminent
7 execution of removal while Petitioner remains in custody.”). Because Petitioner’s
8 claims plainly challenge the government’s decision to execute his removal order—
9 which, as more fully discussed below, includes the decision over *when* and *whether* to
10 do it—§ 1252(g) bars his claim. *See* 8 U.S.C. § 1252(g) (“[N]o court shall have
11 jurisdiction to hear any cause or claim by or on behalf of any alien arising from the
12 decision or action by the Attorney General to . . . execute removal orders.”).

13 Petitioner attempts to avoid § 1252(g)’s bar by focusing on his motion to reopen
14 pending before the BIA and his imminent removal. But the Ninth Circuit has already
15 spoken on this issue. Considering a factually and procedurally analogous case, the Ninth
16 Circuit in *Rauda v. Jennings* rejected the petitioner’s request to stay his removal
17 pending the resolution of his motion to reopen, holding that § 1252(g) precludes judicial
18 review over the claim.⁵ *See* 55 F.4th 773, 776–78 (9th Cir. 2022). In so holding, the
19 *Rauda* court explained that § 1252(g) “does not include temporal caveats” and “the
20 discretion to decide *whether* to execute a removal order includes the discretion to decide
21 *when* to do it”—both of which are covered by the statute. *Id.* at 777 (emphasis in
22 original) (internal quotation marks and citation omitted).

23 Petitioner also argues that his immediate removal “would extinguish his statutory
24 right to reopening.” ECF No. 2-1 at 9; *see also* ECF No. 1 at ¶ 46. But the *Rauda* court
25 rejected that argument too. As the court explained, Petitioner “will continue to have
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27 ⁵ As here, *Rauda* concerned a Salvadoran national with a final removal order, who
28 requested the court order a stay of removal pending adjudication of his motion to reopen
with the BIA.

1 access to the process guaranteed to him under the statute even if he is removed.” *Rauda*,
2 55 F.4th at 777; see *Toor v. Lynch*, 789 F.3d 1055, 1057 (9th Cir. 2015) (“[T]he
3 statutory right to file a motion to reopen and a motion to reconsider is not limited by
4 whether the individual has departed the United States.”). Once the BIA decides his
5 motion, Petitioner “will be able to file a petition for [the circuit court] to review *that*
6 final agency action—including review of the BIA’s denial of his request for a stay of
7 removal pending its decision.” *Rauda*, 55 F.4th at 777. Petitioner has failed to
8 acknowledge, let alone distinguish, clearly controlling case law in either his petition or
9 motion for temporary restraining order.

10 Because *Rauda* controls and dictates that § 1252(g) deprives courts of
11 jurisdiction over claims seeking a stay of removal while a motion to reopen is pending—
12 the very claim Petitioner raises here—the Court lacks jurisdiction over, and must
13 dismiss, the petition and request for interim relief. See *id.* at 778 (“No matter how
14 [petitioner] frames it, his challenge is to the Attorney General’s exercise of his
15 discretion to execute [his] removal order, which we have no jurisdiction to review.”);
16 accord *Ibarra-Perez v. United States*, --- F.4th ---, 2025 WL 2461663, at *8 (9th Cir.
17 Aug. 7, 2025) (noting with approval *Rauda*’s holding that § 1252(g) bars challenges to
18 ICE’s discretionary authority about “when” and “whether” to remove a noncitizen
19 subject to a final, executable order of removal); *Ponce v. Garland*, No.
20 EDCV221751JGBPVC, 2022 WL 14318031, at *3 (C.D. Cal. Oct. 24, 2022)
21 (“Petitioner’s action is indistinguishable from that in *Rauda* and demands the same
22 outcome. Pursuant to § 1252(g), this Court does not have jurisdiction to grant the relief
23 that Petitioner seeks.”); *Eliazar G.C. v. Wofford*, No. 1:24-CV-01032-EPG-HC, 2025
24 WL 1124688, at *3 (E.D. Cal. Apr. 16, 2025) (“[T]he Court finds that § 1252(g) is
25 applicable and this Court lacks jurisdiction to consider Petitioner’s request to stay
26 removal.”).

27 **C. Petitioner has not met the standard for a temporary restraining order.**

28 Alternatively, Petitioner’s motion for a temporary restraining order should be

1 denied because he cannot establish that he is likely to succeed on the underlying merits,
2 there is no showing of irreparable harm, and the equities do not weigh in his favor.

3 In general, the showing required for a temporary restraining order is the same as
4 that required for a preliminary injunction. *See Stuhlbarg Int'l Sales Co., Inc. v. John D.*
5 *Brush & Co., Inc.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). To prevail on a motion for a
6 temporary restraining order, a plaintiff must “establish that he is likely to succeed on
7 the merits, that he is likely to suffer irreparable harm in the absence of preliminary
8 relief, that the balance of equities tips in his favor, and that an injunction is in the public
9 interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Plaintiffs must
10 demonstrate a “substantial case for relief on the merits.” *Leiva-Perez v. Holder*, 640
11 F.3d 962, 968 (9th Cir. 2011). The likely success on the merits “is the most important”
12 *Winter* factor. *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015). So, when a
13 plaintiff has failed to show the likelihood of success on the merits, the court need not
14 consider the remaining factors. *Id.*

15 The final two factors required for interim injunctive relief—balancing of the
16 harm to the opposing party and the public interest—merge when the government is the
17 opposing party. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). “Few interests can be
18 more compelling than a nation’s need to ensure its own security.” *Wayte v. United*
19 *States*, 470 U.S. 598, 611 (1985).

20 **1. No Likelihood of Success on the Merits**

21 Likelihood of success on the merits is a threshold issue. *See Garcia*, 786 F.3d at
22 740. As discussed in detail above, the Court lacks jurisdiction over Petitioner’s habeas
23 petition because he failed to name the proper respondent, *see Doe*, 109 F.4th at 1197,
24 and § 1252(g) indisputably bars review over his claims and requests for relief, *see*
25 *Rauda*, 55 F.4th at 778.

26 Petitioner cannot show entitlement to habeas relief and thus cannot demonstrate
27 a likelihood of success on the underlying merits. *See, e.g., Eliazar G.C.*, 2025 WL
28 1124688, at *3 (considering the petition of a Salvadoran man raising similar claims as

1 Petitioner and finding that “§ 1252(g) is applicable and this Court lacks jurisdiction to
2 consider Petitioner’s request to stay removal.”); *Ponce*, 2022 WL 14318031, at *3
3 (considering the same relief requested here and finding: “Petitioner’s action is
4 indistinguishable from that in *Rauda* and demands the same outcome. Pursuant to
5 § 1252(g), this Court does not have jurisdiction to grant the relief that Petitioner
6 seeks.”); *Mora Flores v. Garland*, No. C24-1692-RSM, 2024 WL 4520052, at *2 (W.D.
7 Wash. Oct. 17, 2024) (denying ex parte motion for TRO noting that “the issue of
8 whether the Court can issue a TRO to prevent a deportation based on a pending Motion
9 to Reopen has been addressed by this Court and by the Ninth Circuit” and holding that
10 “Section 1252(g) precludes the Court from exercising its jurisdiction over Plaintiffs’
11 Motion.”).

12 **2. Irreparable Harm Has Not Been Shown**

13 To prevail on his request for interim injunctive relief, Petitioner must demonstrate
14 “immediate threatened injury.” *Caribbean Marine Services Co., Inc. v. Baldrige*, 844
15 F.2d 668, 674 (9th Cir. 1988). Merely showing a “possibility” of irreparable harm is
16 insufficient. *See Winter*, 555 U.S. at 22. “Issuing a preliminary injunction based only
17 on a possibility of irreparable harm is inconsistent with [the Supreme Court’s]
18 characterization of injunctive relief as an extraordinary remedy that may only be
19 awarded upon a clear showing that the plaintiff is entitled to such relief.” *Id.*

20 Here, because Petitioner’s alleged harm “is essentially inherent in detention, the
21 Court cannot weigh this strongly in favor of Petitioner.” *Lopez Reyes v. Bonnar*, No.
22 18-cv-07429-SK, 2018 WL 7474861, at *10 (N.D. Cal. Dec. 24, 2018); *see Reyes v.*
23 *Wolf*, No. C20-0377JLR, 2021 WL 662659, at *3 (W.D. Wash. Feb. 19, 2021) (finding
24 that detention alone is not an irreparable injury). Moreover, as explained above,
25 Petitioner can continue to pursue his motion to reopen with the BIA after removal. *See*
26 *Rauda*, 55 F.4th at 777; *Toor*, 789 F.3d at 1057. Petitioner has not shown irreparable
27 harm.

1 **3. Balance of Equities Does Not Tip in Petitioners' Favor**

2 It is well settled that “the public interest in enforcement of the immigration laws
3 is significant.” *Blackie’s House of Beef, Inc. v. Castillo*, 659 F.2d 1211, 1221 (D.C. Cir.
4 1981) (collecting cases); *see Nken*, 556 U.S. at 436 (“There is always a public interest
5 in prompt execution of removal orders: The continued presence of an alien lawfully
6 deemed removable undermines the streamlined removal proceedings IIRIRA
7 established, and permits and prolongs a continuing violation of United States law.”)
8 (simplified). And ultimately, “the balance of the relative equities ‘may depend to a large
9 extent upon the determination of the [movant’s] prospects of success.’” *Tiznado-Reyna*
10 *v. Kane*, Case No. C 12-1159-PHX-SRB (SPL), 2012 WL 12882387, at * 4 (D. Ariz.
11 Dec. 13, 2012) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 778 (1987).

12 Again, Petitioner cannot succeed on the merits of his claims because the Court
13 lacks jurisdiction over them, and the public interest in the prompt execution of removal
14 orders is significant. The balancing of equities and the public interest thus weigh heavily
15 against granting equitable relief in this case.

16 **IV. CONCLUSION**

17 For the reasons stated herein, Respondents respectfully request that the Court
18 deny Petitioner’s application for a temporary restraining order and dismiss Petitioner’s
19 habeas petition.

20 DATED: October 6, 2025

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