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IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

DANIEL JAMES CUMMINS,  
Petitioner,  
v.  
MOISES BECERRA, ET AL.,  
Respondents.

CASE NO. 1:25-CV-01853-DC-AC  
RESPONDENTS' OPPOSITION TO  
PETITIONER'S EMERGENCY APPLICATION  
FOR TEMPORARY RESTRAINING ORDER

**I. INTRODUCTION**

This Court should deny Petitioner's request for a temporary restraining order because Petitioner's arguments fall short of demonstrating a likelihood of success on the merits or an entitlement to the requested relief. <sup>1</sup> Petitioner is lawfully detained pursuant to 8 U.S.C. § 1187 because he is a Visa Waiver Program ("VWP") violator and in asylum-only proceedings. Because he is in asylum-only proceedings, Petitioner is not entitled to a bond review hearing. Further, Petitioner has no viable claim to remain in the United States. His claim for asylum is not based on a statutorily protected ground on

<sup>1</sup> The government moves to strike and to dismiss all respondents other than Ron Murray from this case. A petitioner seeking *habeas corpus* relief may only name the officer having custody of him as the respondent. See 28 U.S.C. § 2242; *Rumsfeld v. Padilla*, 542 U.S. 426, 430 (2004); *Doe v. Garland*, 109 F.4th 1188, 1197 (9th Cir. 2024); *Riego v. Current or Acting Field Office Director*, Slip Op., 2024 WL 4384220 (E.D. Cal. Oct. 3, 2024) (ordering Section 2241 petitioner, a non-citizen alien, to file a motion to amend his petition to "name a proper respondent" and setting forth that "[f]ailure to amend the petition and state a proper respondent will result in dismissal of the petition for lack of jurisdiction").

1 which he can obtain asylum. He therefore cannot make the requisite showing for a claim that he has  
2 been subject to unconstitutionally prolonged detention.

3 **II. BACKGROUND**

4 **A. Petitioner entered the United States under the Visa Waiver Program.**

5 Petitioner is a native and citizen of Ireland. Declaration of Deportation Officer Villagran  
6 (“Villagran Decl.”) ¶ 6. In February 2018, Petitioner entered the United States as a non-immigrant  
7 under the Visa Waiver Program (“VWP”). ¶ 6. Under the VWP, Petitioner was not to remain in the  
8 United States beyond May 15, 2018. ¶ 6. Petitioner did, however, remain beyond May 15, 2018,  
9 without permission from the Department of Homeland Security. ¶ 6.

10 **B. Petitioner was convicted of reckless driving in 2021 and later arrested for attempted  
11 murder in 2024.**

12 On or about July 21, 2021, Petitioner was convicted in Humboldt County, California of reckless  
13 driving in violation of California Vehicle Code § 23103. ¶ 7.

14 A few years later, on or about November 5, 2024, Petitioner was arrested in Trinity County,  
15 California for attempted murder in violation of California Penal Code § 187(a). ¶ 7. The charge was  
16 eventually dismissed.

17 **C. DHS detained Petitioner as a VWP violator and placed him in asylum-only  
proceedings.**

18 On or about September 3, 2025, following his release from county jail in Trinity County,  
19 Department of Homeland Security (“DHS”) officers took Petitioner into custody. ¶ 8. At that time,  
20 Petitioner informed DHS officials that he was in good health. Villagran Decl., Exhibit 1, at 3. DHS  
21 issued a Notice of Intent to Issue a Final Administrative Removal Order, charging petitioner under  
22 Immigration and Nationality Act (“INA”) § 237(a)(1)(B), in that he was a non-immigrant under INA §  
23 101(a)(15) that remained in the United States longer than permitted. ¶ 8.

24 On September 3, 2025, DHS issued a VWP Final Administrative Removal Order for a VWP  
25 violator. ¶ 9. Petitioner was placed in asylum-only proceedings as a VWP violator pursuant to a Notice  
26 of Referral to Immigration Judge, Form I-863, dated September 15, 2025. ¶ 10.

27 **D. Petitioner requested a custody redetermination by an immigration judge but later**  
28

1 **withdrew the request.**

2 Petitioner filed a request for a custody redetermination by an immigration judge. ¶ 11. On or  
3 about September 26, 2025, Petitioner withdrew the request. ¶ 11.

4 Petitioner is currently mandatorily detained at the Mesa Verde ICE Processing Center pursuant  
5 to 8 U.S.C. § 1187(c)(2)(E), INA § 217(c)(2)(E). ¶ 12. Petitioner’s next immigration hearing is  
6 scheduled for January 13, 2026. ¶ 13.

7 **E. Petitioner filed a Petition for Writ of Habeas Corpus and an Emergency Application**  
8 **for Temporary Restraining Order.**

9 On December 15, 2025, Petitioner filed a Petition for Writ of Habeas Corpus and Complaint for  
10 Declaratory and Injunctive Relief asserting a substantive due process violation under the Fifth  
11 Amendment, a violation of the INA and implementing regulations, and a failure to consider parole  
12 request. ECF 1, at 3-4. The Petition sought Petitioner’s immediate release from custody, a temporary  
13 restraining order and/or preliminary injunction restraining ICE from removing or transferring Petitioner,  
14 a declaration that ICE’s detention is unlawful and violates the Fifth Amendment, an order that ICE  
15 adjudicate Petitioner’s parole request, and award attorney’s fees and costs. ECF 1, at 4. The same day,  
16 Petitioner filed an Emergency Application for Temporary Restraining Order largely reiterating his  
17 claims and seeking the same relief on an emergent basis. *See generally*, ECF 3.

18 Following Petitioner’s filings, the Court issued a minute order directing Respondents to file an  
19 opposition to Petitioner’s motion for a temporary restraining order by noon on December 18, 2025. ECF  
20 6. Respondents filed a motion for a twenty-four-hour extension of time to file its opposition, which the  
21 Court granted. ECF 9. Respondents request that the Court deny Petitioner’s motion for a temporary  
22 restraining order for the reasons stated herein.

23 **III. ARGUMENT**

24 **A. The Standard for Temporary Restraining Orders**

25 Temporary restraining orders (“TROs”) are governed by the same standard applicable to  
26 preliminary injunctions. *See Cal. Indep. Sys. Operator Corp. v. Reliant Energy Servs., Inc.*, 181 F.  
27 Supp. 2d 1111, 1126 (E.D. Cal. 2001). Preliminary injunctions are “never awarded as of right.” *Winter*  
28 *v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (citation omitted). A party seeking a preliminary

injunction faces a “difficult task” in showing that they are entitled to such an “extraordinary remedy.” *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010) (internal quotation omitted).

“A plaintiff seeking a preliminary injunction must show that: (1) she is likely to succeed on the merits, (2) she is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in her favor, and (4) an injunction is in the public interest.” *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (internal quotation omitted). Alternatively, a plaintiff can show “serious questions going to the merits and the balance of hardships tips sharply towards [plaintiffs], as long as the second and third . . . factors are satisfied.” *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017).

The purpose of a preliminary injunction “is to preserve the status quo and the rights of the parties until a final judgment issues in the cause.” *U.S. Philips Corp. v. KBC Bank N.V.*, 590 F.3d 1091, 1094 (9th Cir. 2010). A preliminary injunction may not be used to obtain “a preliminary adjudication on the merits,” but only to preserve the status quo pending final judgment. *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984). Where “a party seeks mandatory preliminary relief that goes well beyond maintaining the status quo *pendente lite*, courts should be extremely cautious about issuing a preliminary injunction.” *Martin v. International Olympic Committee*, 740 F.2d 670, 675 (9th Cir. 1984); *see also Committee of Cent. American Refugees v. Immigration and Naturalization Serv.*, 795 F.2d 1434, 1442 (9th Cir. 1986).

**B. Petitioner is unlikely to succeed on the merits.**

**1. Petitioner is lawfully detained pursuant to 8 U.S.C. § 1187(c)(2)(E).**

Petitioner is lawfully detained pursuant to 8 U.S.C. § 1187, INA § 217, because he is a VWP violator and in asylum-only proceedings. Because he is lawfully detained, Petitioner cannot make the requisite showing for a TRO that he is likely to succeed on the merits. Accordingly, Petitioner’s motion should be denied.

The VWP allows citizens of certain countries to enter and remain in the United States for up to 90 days as tourists without visas. *See* 18 U.S.C. § 1187; *see also Patel v. Garland*, No. 21-17024, U.S. App. LEXIS 4076, at \*2 (9th Cir. Ariz. Feb. 22, 2024). As part of the program, VWP aliens voluntarily waive their right to challenge the basis for their removal. *See Shehu v. Att’y Gen.*, 482 F.3d 652, 654 (3d

1 Cir. 2007). There are some exceptions to that waiver such as when a VWP alien applies for asylum. *Id.*;  
2 *see also* 8 U.S.C. § 1187(b).

3 VWP aliens are subject to detention pursuant to 8 U.S.C § 1187(c)(2)(E), as opposed to 8 U.S.C.  
4 §§ 1225 or 1226. *See Matter of A.W.*, 25 I&N Dec. 45 (BIA 2009). In *A.W.*, the Board of Immigration  
5 Appeals (“BIA”) specifically noted that 8 U.S.C § 1187(c)(2)(E) is the statutory authority for detention  
6 for a VWP alien who is in asylum-only proceedings. *Id.* at 47. Asylum-only proceedings apply to  
7 certain aliens who are not entitled to full asylum proceedings under the INA, including VWP aliens. 8  
8 C.F.R. § 1208.2(c)(1)(iii); *see also Bao Tai Nian v. Holder*, 683 F.3d 1227, 1228 (9th Cir. 2012).  
9 Asylum-only proceedings are limited proceedings in which the immigration judge considers only  
10 applications for asylum, withholding of removal, and protection under the Convention Against Torture.  
11 8 C.F.R. § 1208.2(c)(3)(i); 8 C.F.R. § 1240.1(a)(1)(iii). Asylum-only proceedings are commenced with  
12 the filing of a Notice of Referral to Immigration Judge, Form I-863. *See Matter of A.W.*, 25 I&N Dec. at  
13 47.

14 Here, Petitioner is a VWP alien in asylum-only proceedings. He violated the requirements of the  
15 VWP when he was convicted of reckless driving in 2021 and arrested for attempted murder in 2024.  
16 The Form I-863 dated September 15, 2025, then initiated Petitioner’s asylum-only proceedings.  
17 Petitioner’s asylum-only proceedings remain pending with his next immigration court hearing set for  
18 January 13, 2026. Accordingly, given Petitioner’s status as VWP violator in asylum-only proceedings,  
19 Petitioner is lawfully detained pursuant to 8 U.S.C § 1187(c)(2)(E).

20 **2. Petitioner is not entitled to a review of his custody determination.**

21 Petitioner is not entitled to a bond hearing or review of his custody determination before an  
22 immigration judge. *See generally, Matter of A.W.*, 25 I&N Dec. 45 (BIA 2009). In *Matter of A.W.*, the  
23 BIA considered whether aliens admitted to the United States based on the VWP are entitled to a bond  
24 hearing and whether immigration judges have the authority to redetermine a VWP alien’s custody  
25 conditions. *Id.* at 46-47. The BIA held that a VWP alien is not entitled to a bond hearing before an  
26 immigration judge. *Id.* Immigration judges do not have authority to redetermine custody conditions,  
27 because the authority to do so has not been delegated to immigration judges. *Id.* Petitioner’s claim then  
28 that he has not been afforded appropriate custody review is without merit. ECF 3, at 5.

1                   **3.       Petitioner’s detention has not been unconstitutionally prolonged.**

2           Petitioner has failed to demonstrate that the length of his detention violates the Constitution or  
 3 federal law. ECF 3, at 6. Petitioner argued that his detention violates *Zadvydas v. Davis* and its  
 4 prohibition on indefinite civil detention without a removal likelihood. *Id.*; *Zadvydas v. Davis*, 533 U.S.  
 5 678 (2001). In *Zadvydas*, the Supreme Court held that ICE could not indefinitely hold aliens who had  
 6 been ordered removed but where the actual removal was not reasonably foreseeable. 533 U.S. 678, 699  
 7 (2001). The time period for post-removal detention must be “reasonable.” *Id.* at 690. The petitioner  
 8 has the initial burden to provide “good reason to believe that there is no significant likelihood of removal  
 9 in the reasonably foreseeable future.” *Id.* at 701.

10          Here, Petitioner failed to make a showing that there is no significant likelihood of removal in the  
 11 reasonably foreseeable future. In fact, to the extent Petitioner is arguing that removal is unlikely in the  
 12 reasonably foreseeable future because “he has a viable claim for asylum. . . .,” his argument is contrary to  
 13 the law. ECF 3, at 6. Petitioner does not have a viable claim to remain in the United States based on his  
 14 asylum application. The basis for Petitioner’s asylum claim—that he suffers from a medical condition  
 15 that cannot be treated in Ireland—is not a statutorily protected ground on which he can obtain asylum.  
 16 *See* 8 U.S.C. § 1101(a)(42)(A). His claim is not based on a “persecution or a well-founded fear of  
 17 persecution on account of race, religion, nationality, membership in a particular social group, or political  
 18 opinion.” *Id.*

19          On the other hand, Petitioner violated the terms of his VWP authorization by remaining in the  
 20 United States beyond the date he was permitted to stay, incurred a criminal conviction and later an arrest  
 21 for a serious criminal offense, and has been in DHS’ custody for approximately three and a half months.  
 22 He has been issued a Notice of Intent to Issue a Final Administrative Removal Order, and his asylum  
 23 application is likely not viable. Accordingly, Petitioner’s argument is insufficient to meet the requisite  
 24 showing under *Zadvydas*.

25                   **C.       Petitioner Is Not Likely to Suffer Irreparable Harm.**

26          While the Ninth Circuit has recognized that “[a]n alleged constitutional infringement will often  
 27 alone constitute irreparable harm,” *Goldie’s Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 472 (9th  
 28 Cir. 1984), the Court should not apply the presumption where, as here, a plaintiff fails to demonstrate “a

sufficient likelihood of success on the merits of its constitutional claims to warrant the grant of a preliminary injunction.” *Assoc’d Gen. Contractors of Cal., Inc. v. Coal for Econ. Equity*, 950 F.2d 1401, 1412 (9th Cir.1991)). Here, as demonstrated above and as in *Goldie’s Bookstore*, Petitioner’s purported constitutional claim is “too tenuous” to support an injunction. *Goldie’s Bookstore*, 739 F.2d at 472.

**D. The Balance of Equities and the Public Interest.**

The balance of the equities and public interest do not automatically tip toward Petitioner simply because he has alleged a due process violation. Even where constitutional rights are implicated, where a petitioner has not shown a likelihood of success on the merits of a claim, a court should not grant a preliminary injunction. *See Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005). The Executive also has an important interest in exercising its enforcement authority. “The government has a strong interest in enforcing immigration laws.” *Abdul-Samed v. Warden*, 2025 WL 2099343, at \*8 (E.D. Cal. July 25, 2025) (concluding, however, that the government interest in detention “without a bond hearing” was outweighed by petitioner’s liberty interest). Here, given Petitioner’s lawful detention pursuant to 8 U.S.C. § 1187, INA § 217, he cannot establish a likelihood of success on the merits, and the Court should deny his request for a TRO.

**IV. CONCLUSION**

Petitioner is lawfully detained, and the facts of this case present no due process concern. Respondents respectfully request that the Court deny Petitioner’s request for a TRO.

Dated: December 19, 2025

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United States Attorney

By: /s/ BRITTANY M. GUNTER  
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