

**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
Homeland Security; DAVID RIVERA,
Director of the New Orleans Field Office of
U.S. Immigration and Customs Enforcement;
and DAVID COLE, Warden of the LaSalle
Detention Facility,

Respondents.

CASE NO. _____

JUDGE:

MAGISTRATE JUDGE:

Date: March 6, 2017

PETITION FOR WRIT OF HABEAS CORPUS

INTRODUCTION

Petitioner Daniela Vargas is a 22-year old woman who was brought to the United States at the age of seven from Argentina. Ms. Vargas grew up in Morton, Mississippi, where she has lived nearly continuously since 2001. She graduated from Morton High School in 2013 and aspires to finish a degree in math and become a professor or teacher. Ms. Vargas has twice been granted deferred action through the Deferred Action for Childhood Arrivals (“DACA”) program, in 2012 and 2014, and her application for DACA renewal is currently pending. In addition, a petition for a “U” nonimmigrant visa was filed on her behalf in 2014 based on Ms. Vargas’ status as a family member 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. That petition is also pending.

On February 15, 2017, Immigration and Customs Enforcement (“ICE”) agents raided Ms. Vargas’ home and arrested her father and brother. Ms. Vargas informed the agents that she had been granted DACA. After the agents led her father and brother away in handcuffs, Ms. Vargas went back into her home, locked the door behind her, and retreated into a closet. Later, the ICE agents returned with a search warrant and entered the home with force, breaking down the door. Ms. Vargas remained in the closet out of fear of the armed ICE agents, one of whom pointed a gun at her when she emerged. Before the agents left her house, they told Ms. Vargas that they knew her DACA had lapsed, but that they were giving her a “hall pass.”

After the raid on her home and the arrest of her father and brother, Ms. Vargas spoke to multiple media outlets about the experience, which terrified her. Her story attracted local and national media attention. On March 1, 2017, Ms. Vargas participated in a live press conference in Jackson, Mississippi that was critical of the ICE raids in Mississippi. She spoke publicly about

ICE's detention of her father and brother, and the need for a pathway to citizenship for undocumented families.

Immediately following the press conference, ICE agents arrested and detained Ms. Vargas in retaliation for the exercise of her First Amendment rights. ICE agents pulled over the car in which Ms. Vargas was the passenger and placed her under arrest in retaliation for her constitutionally protected free speech. They placed her in handcuffs and transported her to the LaSalle Detention Facility ("LaSalle") the same day. She has been detained at LaSalle since March 1, 2017.

Following her arrest and detention, Respondent the United States Department of Homeland Security ("DHS") informed Ms. Vargas and/or her attorneys that she will be imminently removed from the United States without a hearing. DHS contends that Ms. Vargas is not entitled to an opportunity to contest her removal from this country because she allegedly entered this country through the Visa Waiver Program ("VWP") in 2001, when she was seven years old. The statute establishing the VWP requires that the non-citizen entering the United States under this program waive his or her right "to contest, other than on the basis of an application for asylum, any action for removal of the alien." 8 U.S.C. § 1187(b)(2).

DHS has produced no proof that Ms. Vargas did, in fact, waive her rights. Even assuming evidence of such a waiver exists, detaining and deporting Ms. Vargas without affording her a hearing would violate her Fifth Amendment due process rights because, as a legal and factual matter, she did not—and, at age 7, could not—knowingly and voluntarily waive her right to seek a hearing to remain in the United States. *See Nose v. Attorney General*, 993 F.2d 75, 79 (5th Cir. 1993). In light of Ms. Vargas' pending petitions for immigration relief, moreover, barring her

from challenging her ongoing detention and removal would result in substantial prejudice and irreparable harm.

For the reasons outlined below, Ms. Vargas' continued detention and inability to contest her detention and removal violate her Fifth and First Amendment rights, as well as the Administrative Procedure Act ("APA"). Petitioner respectfully applies to this Court for a writ of habeas corpus to remedy her unlawful detention by Respondents, and for declaratory and injunctive relief to prevent such harms from recurring.

JURISDICTION AND VENUE

1. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1361, 2241, 2243, and the Habeas Corpus Suspension Clause of the U.S. Constitution (U.S. Const. art. I, § 9, cl. 2).

2. Venue lies in the Western District of Louisiana, because a substantial part of the events or omissions giving rise to this action occurred in the District. *See* 28 U.S.C. § 1391 and 28 U.S.C. § 2241. Divisional venue is proper in the Alexandria Division. *See* LR77.3.

3. No petition for habeas corpus has previously been filed in any court to review Petitioner's case.

PARTIES

4. Daniela Vargas, named Petitioner, is a 22-year-old citizen of Argentina who has lived continuously in the United States since 2001. Ms. Vargas has been in the custody of Respondents since March 1, 2017.

5. The U.S. Department of Homeland Security ("DHS") is a cabinet department of the United States federal government with the primary mission of securing the United States. ICE is a component agency of DHS, as is the U.S. Citizenship and Immigration Service ("USCIS").

6. Respondent John Kelly is the Secretary of DHS. He is sued in his official capacity.

7. Respondent David Rivera is the Director of the New Orleans Field Office of ICE, which has immediate custody of Petitioner. He is sued in his official capacity.

8. Respondent David Cole is the warden of the LaSalle Detention Center. He is sued in his official capacity.

LEGAL BACKGROUND

9. The Visa Waiver Program (“VWP”) permits noncitizens from certain countries to enter the United States for a period of 90 days without obtaining a visa. *See* 8 U.S.C. § 1187(a)(1).

10. The VWP statute allows noncitizens to enter the country without a visa if they waive the right, *inter alia*, “to contest, other than on the basis of an application for asylum, any action for removal” 8 U.S.C. § 1187(b)(2); *see also* 8 C.F.R. § 217.4(b)(1).

11. On June 15, 2012, DHS established a program called “Deferred Action for Childhood Arrivals (DACA).” *See* Mem. of Janet Napolitano, Sec’y of Homeland Security, to Alejandro Mayorkas, Director, U. S. Citizenship and Immigration Services (“USCIS”), Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, June 15, 2012, *available at* <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> (Attached as Exhibit A). The DHS Secretary explained that DACA addresses the situation of “certain young people who were brought to this country as children and know only this country as home” and that the immigration laws are not “designed to remove productive young people to countries where they may not have lived or even speak the language.” *Id.* at 1-2.

12. Pursuant to the 2012 DACA Memorandum, individuals who came to the United States as children, lack a serious criminal history, attend school, pay a fee, and meet other criteria, may request that the DHS Secretary grant them deferred action, a form of prosecutorial discretion, for a two-year period. Those granted deferred action in this manner are also eligible to obtain employment authorization.

13. The current administration has made clear that the DACA program remains in place at this time. *See* Mem. of John Kelly, Sec’y of Homeland Security, to Department of Homeland Security 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) *available at* https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf (attached as Ex. B).

14. The “U” nonimmigrant visa category was established by Congress to provide immigration relief to a noncitizen who: (1) “has suffered substantial physical or mental abuse as a result of having been a victim of [certain qualifying] criminal activity;” (2) “possesses information concerning [the] criminal activity;” and (3) “has been helpful, is being helpful, or is likely to be helpful” to law enforcement authorities, where the crime occurred in the United States. 8 U.S.C. § 1101(a)(15)(U)(i)-(iv).

15. The children of a U visa petitioner are eligible to obtain “derivative” U nonimmigrant status if they are under the age of 21 at the time the petition is filed. 8 U.S.C. § 1184(p)(7)(A).

16. Individuals obtaining visas under the U nonimmigrant category (including derivatives of the primary U visa petitioner) may apply to adjust their status to obtain lawful permanent residence after a period of three years. 8 U.S.C. § 245(m).

STATEMENT OF FACTS

17. Daniela Vargas is a 22-year old who has lived in the United States continuously since her arrival in 2001 at age seven. She has resided in Morton, Mississippi, for the majority of that time. She is a citizen of Argentina.

18. Ms. Vargas entered the United States from Argentina in 2001.

19. DHS has alleged that Ms. Vargas entered through the Visa Waiver Program (“VWP”) and that she personally executed a waiver of her rights to contest her future removability on any ground but asylum.

20. As of 2001, Argentina was among the nations designated as eligible for the VWP.

21. Ms. Vargas has no recollection or personal knowledge of whether she entered under the VWP.

22. Since 2001, Ms. Vargas has resided in the United States—the bulk of that time in Morton, Mississippi. She graduated from Morton High School, with honors, and ranked 9th in her class with a 3.77 GPA in 2013. She has attended East Central Community College and the University of Southern Mississippi. Ms. Vargas aspires to complete her degree in math and become a professor or teacher.

23. Ms. Vargas applied for and received deferred action under the DACA program in 2012, which she successfully renewed in 2014. Pursuant to the requirements of the DACA program, she submitted to and passed an extensive background check. She also received employment authorization as a DACA beneficiary.

24. Ms. Vargas' most recently granted period of deferred action expired in November 2016. Once she was able to obtain the \$495 for the filing fee, she submitted a DACA renewal application to USCIS. That application was received on or about February 10, 2017.

25. A petition for a U nonimmigrant visa was filed with USCIS on Ms. Vargas' behalf, as a derivative of at least one of her parents, in or around 2014, when she was under the age of 21. That application remains pending.

26. On the morning of February 15, 2017, ICE conducted a raid on the home in Jackson, Mississippi, where Ms. Vargas resided with her father and brother. Multiple armed ICE agents arrested and led away her father and brother.

27. After seeing her father being led away in handcuffs, Ms. Vargas retreated into her home, locked the door behind her, and hid in a closet. Later, the ICE agents returned with a search warrant and entered the home with force, breaking down an exterior door. Ms. Vargas remained in the closet out of fear of ICE's aggressive tactics. When she emerged from the closet, one of the ICE agents was aiming his gun at her. The agents handcuffed Ms. Vargas while they searched the home. Before the agents left the house, they released Ms. Vargas from her handcuffs. The agents told Ms. Vargas that they knew her DACA had lapsed, but that they were going to give her a "hall pass." The agents left without arresting Ms. Vargas.

28. In the days following the raid, Ms. Vargas gave multiple interviews to local and national media outlets. She described ICE's actions during the raid on her home and the arrest of her father and brother. She also described how she felt compelled her to hide in a closet out of fear while the armed agents stormed her home.

29. On March 1, 2017, Ms. Vargas participated in a press conference in Jackson organized by community groups to speak out against recent ICE raids in the area. The press

conference was covered by multiple print and television news outlets. Ms. Vargas gave a statement at the press conference noting the contributions of DACA recipients, describing the sacrifices of her parents, and expressing the need for a path to citizenship for undocumented immigrants. She also described how she felt that the United States was her home, noting that “my father and brother await deportation while I continue to fight this battle as a dreamer to help contribute to this country which I feel is very much my country.”

30. When the press conference concluded, Ms. Vargas left in her car driven by her friend Jordan Macaulay Sanders. About five minutes after leaving the press conference, ICE agents in two vehicles pulled over Ms. Sanders’ car. One ICE agent who was also present during the raid of her home said to Ms. Vargas, “Remember me? You know who we are; you know why we’re here,” and “you’re under arrest for being an illegal immigrant.” They immediately placed Ms. Vargas in handcuffs and removed her from the car.

31. The ICE agents took Ms. Vargas to the ICE office in Pearl, Mississippi, where they held her for a few hours. From there, Ms. Vargas was transported to LaSalle Detention Facility in Jena, Louisiana, where she remains to the present.

32. When asked to comment about Ms. Vargas’ arrest, ICE provided a statement indicating that it was a “targeted” enforcement operation.

33. Although ICE initially issued a public statement indicating that Ms. Vargas’ case would proceed before an immigration judge, it later asserted that Ms. Vargas will be summarily deported to Argentina.

34. Defendants have noted their intent to deport Ms. Vargas pursuant to a “Visa Waiver Program (VWP) Final Administrative Removal Order,” which alleges that she entered under the VWP and waived her right to contest removal.

35. The VWP “Notice of Intent to Issue a Final Administrative Removal Order” (ICE Form 71-058) containing DHS’ allegations against Ms. Vargas notes “If you wish to contest any of the above factual allegations or your removability, you will be granted 48 hours from the time of service of this notice to do so.”

36. Although Ms. Vargas’ attorneys advised DHS on March 1, 2017 that they represented her, DHS did not provide them with a copy of the Notice of Intent to Issue a Final Administrative Removal Order or the Final Administrative Removal Order at any point.

37. On Friday, March 3, 2017, attorneys for Ms. Vargas formally requested that various ICE officials exercise their discretion to release her and to stay her removal. That request remains pending.

38. Ms. Vargas is at imminent risk of deportation to Argentina—a country she left in 2001 at age seven, that she scarcely knows, and to which she fears returning.

CAUSES OF ACTION

COUNT ONE

FIFTH AMENDMENT – DUE PROCESS

DENIAL OF OPPORTUNITY TO CHALLENGE CONTINUED DETENTION

39. Petitioner repeats and incorporates by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

40. The Due Process Clause of the Fifth Amendment to the United States Constitution provides that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. V.

41. Procedural due process requires that the government be constrained before it acts in a way that deprives individuals of liberty interests protected under the Due Process Clause of the Fifth Amendment.

42. Ms. Vargas is indisputably entitled to the protections of the Due Process Clause. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“[T]he Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”). Ms. Vargas has lived in the United States continuously since 2001 and has significant ties to this country.

43. Respondents have deprived Ms. Vargas of her liberty interest protected by the Fifth Amendment by detaining her since March 1, 2017, without any hearing to determine whether her ongoing detention is justified.

44. To the extent that Respondents claim that Ms. Vargas is precluded from challenging her detention because of the operation of the Visa Waiver Program, DHS has presented no evidence that Ms. Vargas did, in fact, waive her right to contest her removal.

45. Even if such evidence were presented, Ms. Vargas did not—and could not—knowingly and voluntarily waive her right to contest her deportation when she allegedly entered this country through the VWP at age seven. *See Nose*, 993 F.2d at 79 (waiver of noncitizen’s right to a hearing to contest removal must be knowing and voluntary, and court “must indulge in every reasonable presumption against a waiver.”) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

46. Ms. Vargas has submitted an application for renewal of her DACA status, which is pending with USCIS. She previously obtained deferred action under the DACA program two times, in 2012 and 2014, following the rigorous screening process established by DHS.

47. In addition, a petition was submitted on Ms. Vargas’s behalf for a U nonimmigrant visa as the child of a victim of a serious crime who has suffered severe mental or

physical abuse and is cooperating with law enforcement in the prosecution of that crime. That petition is pending with USCIS.

48. In light of these pending applications for immigration relief, as well as any other relief to which she could be eligible, the violation of Ms. Vargas' Due Process rights results in substantial prejudice to her.

49. Respondents' actions in detaining Ms. Vargas without any procedure to contest her ongoing unlawful detention violate the Fifth Amendment.

COUNT TWO
FIFTH AMENDMENT – DUE PROCESS
DENIAL OF OPPORTUNITY TO CONTEST SUMMARY REMOVAL

50. Petitioner repeats and incorporates by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

51. Respondents' actions in denying Ms. Vargas an opportunity to contest her summary removal from the United States deny her rights to Due Process.

52. As set forth in Count One, DHS has presented no evidence that Ms. Vargas did, in fact, waive her right to contest her removal.

53. As set forth in Count One, Ms. Vargas did not—and could not—knowingly and voluntarily waive her right to a hearing to contest her deportation when she entered this country through the VWP at age seven.

54. Ms. Vargas has submitted an application for renewal of her DACA status, which is pending with USCIS. She previously obtained deferred action under the DACA program two times, in 2012 and upon renewal in 2014, following the rigorous screening process established by DHS.

55. A petition has been filed on Ms. Vargas's behalf as a beneficiary of U nonimmigrant status as the child of a victim of a serious crime who has suffered severe mental or physical abuse and is cooperating with law enforcement in the prosecution of that crime. That petition is pending with USCIS.

56. Ms. Vargas fears returning to Argentina, and ICE has not asked her if she is afraid of returning or meaningfully advised her of her right to apply for asylum.

57. In light of these pending applications for immigration relief, as well as any other relief to which she could be eligible, the violation of Ms. Vargas' Due Process rights results in substantial prejudice to her.

58. Respondents' actions in detaining Ms. Vargas without any procedure to contest her summary deportation violate the Fifth Amendment.

**COUNT THREE
FIFTH AMENDMENT – SUBSTANTIVE DUE PROCESS**

59. Petitioner repeats and incorporates by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

60. Petitioners' continued detention of Ms. Vargas violates her right to substantive due process protected by the Fifth Amendment.

61. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690. Any deprivation of this fundamental liberty interest must be accompanied not only by adequate procedural protections, but also by a "sufficiently strong special justification" to outweigh the significant deprivation of liberty. *Id.*

62. Ms. Vargas should not be detained. She is neither a flight risk, nor a risk to public safety or national security, and has twice passed the rigorous vetting conducted by DHS—first in

applying for DACA and in a subsequent renewal. Accordingly, Respondents cannot show any valid justification—let alone a “sufficiently strong special justification”—for depriving Ms. Vargas of her fundamental rights.

63. The Due Process Clause prohibits the government from punishing people for engaging in conduct that the government itself has encouraged. *See, e.g., Cox v. State of La.*, 379 U.S. 559, 571 (1965) (holding that the government could not punish protestors for demonstrating in a location where state officials had said the protest was allowed); *Raley v. State of Ohio*, 360 U.S. 423, 438 (1959) (holding that witnesses could not be punished for refusing to answer self-incriminating questions from a State legislative commission when the commission itself had told the witnesses they could decline to answer such questions as doing so would amount to “the most indefensible sort of entrapment by the State”).

64. For all of the foregoing reasons, Ms. Vargas’ continued detention is in violation of her substantive due process rights.

COUNT FOUR
FIRST AMENDMENT – RETALIATION

65. Petitioner repeats and incorporates by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

66. The First Amendment to the United States Constitution prohibits government action that restricts freedom of speech. “The First Amendment prohibits not only direct limits on individual speech but also adverse governmental action taken against an individual in retaliation for the exercise of protected speech activities.” *Keenan v. Tejada*, 290 F.3d 252, 258 (5th Cir. 2002).

67. Speech that addresses matters of government policy, including criticism of law enforcement practices, is entitled to vigorous First Amendment protection. Indeed, “[t]he

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.” *City of Houston, Tex. v. Hill*, 482 U.S. 451, 462–63 (1987).

68. Moreover, all 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 Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1064 (9th Cir. 1995) (“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.”).

69. The First Amendment precludes law enforcement officials from retaliating by targeting, detaining, arresting, and/or seeking to deport an individual engaging in protected speech where the officials’ actions “caused [the speaker] to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity” and were “substantially motivated against the plaintiffs’ exercise of constitutionally protected conduct.” *Keenan*, 290 F.3d at 258.

70. When immigration officers’ decisions to target, arrest, detain, or deport a non-citizen are substantially motivated by that individual’s protected speech, those decisions violate the First Amendment.

71. Ms. Vargas’s statements to the press about her experience when ICE agents raided her home on February 15, 2017, including but not limited to those she made at the press conference on March 1, 2017, exemplify the kind of speech the First Amendment was intended to—and does—protect.

72. The arrest, detention, and imminent deportation that Ms. Vargas currently faces have injured her and continue to injure her, and would chill any person of ordinary firmness from continuing to speak out on issues related to immigration enforcement and policy.

73. Respondents' actions in targeting, arresting, detaining, and seeking to deport Ms. Vargas are substantially motivated by Ms. Vargas' exercise of constitutionally-protected conduct—namely, her decision to speak out against ICE's enforcement tactics and the effects it has had on her and her family.

74. Respondents' ongoing detention of Vargas violates the First Amendment to the United States Constitution.

**COUNT FIVE
ADMINISTRATIVE PROCEDURE ACT**

75. Petitioner repeats and incorporates by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

76. The Administrative Procedure Act ("APA") provides a right to sue when an individual has been "aggrieved" by a "final agency action for which there is no other adequate remedy in court." 5 U.S.C. § 704.

77. Respondent DHS targeted, arrested, and detained Petitioner in unconstitutional retaliation for exercising her right to free speech protected by the First Amendment of the U.S. Constitution, and in violation of the Due Process Clause of the Fifth Amendment.

78. Respondent DHS has violated procedural and substantive requirements of the Fifth Amendment and the Immigration and Nationality Act by seeking to deport Ms. Vargas to Argentina on the basis of an alleged waiver of rights that Ms. Vargas could not have knowingly and voluntarily executed.

79. In targeting, arresting, and detaining Ms. Vargas and seeking to remove her to Argentina, Respondent DHS relied on impermissible factors and failed to consider many relevant factors, including her constitutional rights, her long-standing ties to the United States, her pending DACA renewal application, her pending petition for a U nonimmigrant visa, her fear of return to her country, and current agency policies and guidance.

80. Respondent DHS' actions in targeting, arresting, detaining, and seeking to remove Ms. Vargas 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 the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A)-(D).

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays that this Court grant the following relief:

- (1) Issue a Writ of Habeas Corpus requiring Respondents to release Petitioner;
- (2) Issue an injunction ordering Respondents to provide full and complete records necessary for Petitioner to challenge her removal in court;
- (3) Issue an injunction ordering Respondents to rescind the Final Administrative Removal Order;
- (4) Enter a judgment declaring that Respondents' detention of Respondent is in violation of her First and Fifth Amendment rights as well as the Administrative Procedure Act;
- (5) Award Petitioner reasonable costs and attorney's fees; and
- (6) Grant any other and further relief that this Court may deem fit and proper.

DATED: March 6, 2017

Respectfully submitted,

/s/ William Most

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