

Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ANDRES RAMIREZ-MARTINEZ,
MANUEL URIOSTEGUI, AND
ERICSON GONZALES,

Plaintiffs,

v.

UNITED STATES IMMIGRATION
AND CUSTOMS ENFORCEMENT;
THOMAS S. WINKOWSKI, Principal
Deputy Assistant Secretary of the U.S.
Immigration and Customs Enforcement;
UNITED STATES DEPARTMENT OF
HOMELAND SECURITY; JEH
JOHNSON, Secretary of Homeland
Security; NATHALIE R. ASHER,
Director of the Seattle Field Office of
U.S. Immigration and Customs
Enforcement,

Defendants.

No. 3:14-cv-05273-RJB

MOTION FOR STAY OF PLAINTIFF
GONZALES'S DEPORTATION

Noted for Hearing at 9:30 a.m.
on Friday, May 16, 2014

1 Gonzales's deposition. Indeed, this Court may wish to exert its authority to preserve its jurisdic-
 2 tion to ensure that it has all relevant information and evidence before it and that Defendants may
 3 not thwart this Court's ability to review Defendants' actions by deporting Plaintiff Gonzales.

4 **A. This Court Should Exercise Its Authority and the Discretion to Stay Plaintiff Gon-**
 5 **zales's Deportation While His Constitutional Claims are Resolved.**

6 A stay is "'an exercise of judicial discretion,' and '[t]he propriety of its issue is dependent
 7 upon the circumstances of the particular case.'" *Nken v. Holder*, 556 U.S. 418, 432-33 (2009)
 8 (quoting *Virginian R. Co. v. United States*, 272 U.S. 658, 672 (1926)). Indeed, "[t]he authority
 9 to grant stays has historically been justified by the perceived need 'to prevent irreparable injury
 10 to the parties or to the public[.]'" *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 9 (1942).

11 1. This Court Has the Authority to Issue a Stay Under the All Writs Act.

12 The All Writs Act, 28 U.S.C. § 1651 provides, "The Supreme Court and all courts estab-
 13 lished by Act of Congress may issue all writs necessary or appropriate in aid of their respective
 14 jurisdictions and agreeable to the usages and principles of law." The All Writs Act empowers a
 15 court to issue an order designed "to preserve jurisdiction that the court has acquired from some
 16 other independent source in law." *Jackson v. Vasquez*, 1 F.3d 885, 889 (9th Cir. 1993). Because
 17 this Court has pre-existing jurisdiction invoked by Plaintiffs' Complaint for redress for First
 18 Amendment violations, it also has authority to issue any writs and aid necessary to preserve its
 19 jurisdiction over these claims.

20 2. Standard for Issuance of a Stay.

21 Plaintiff Gonzales meets the requisite standards for the issuance of a stay because he is
 22 able to: (1) make "a strong showing that he is likely to succeed on the merits"; (2) demonstrate
 23 that he "will be irreparably injured absent a stay"; (3) show that the "issuance of the stay will
 24 [not] substantially injure the other parties interested in the proceeding"; (4) prove that the "public
 25 interest lies" in issuance of a stay. *Nken*, 556 U.S. at 434.¹

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 28
 29 ¹ There is "substantial overlap" between this standard and that applicable to preliminary injunctions, "not because the two are one and the same, but because similar concerns arise whenever a court order may allow or disallow anticipated action." *Id.*

1 a. *Plaintiff Gonzales Is Likely to Succeed on the Merits of his Underlying*
 2 *First Amendment Retaliation Claim.*

3 Plaintiff Gonzales filed this lawsuit seeking injunctive and declaratory relief to address
 4 Defendants' retaliation against Plaintiff Gonzales and the other plaintiffs for engaging in protect-
 5 ed speech. *See* Dkt. # 4-1 (Complaint). Plaintiff Gonzales and his co-Plaintiffs are likely to suc-
 6 ceed on the merits of their First Amendment retaliation claims. In order to succeed on the claim
 7 Plaintiff Gonzales must show: (1) that he engaged in conduct protected by the First Amendment;
 8 (2) ICE took an adverse action against him (3) because of that conduct protected by the First
 9 Amendment; (4) ICE's action chilled Plaintiff Gonzales's exercise of his First Amendment
 10 rights; and (5) ICE's action did not reasonably advance a legitimate institutional goal. *Rhodes v.*
 11 *Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2004). All five elements are present here, and evi-
 12 dence indicates that ICE retaliated against Plaintiffs for engaging in protected speech.

13 (1) *Plaintiffs Engaged in First Amendment Protected Speech.*

14 As immigrants, Plaintiffs enjoy all of the protections of the Bill of Rights that are not ex-
 15 pressly limited to citizens, including most importantly here, the protections of the First Amend-
 16 ment. *See Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (the First Amendment protects speech
 17 activities of citizens as well as immigrants); *see also Kim Ho Ma v. Ashcroft*, 257 F.3d 1095,
 18 1109 (9th Cir. 2001) (Fifth and Fourteenth Amendments protect all who have entered the United
 19 States regardless of status).² Plaintiffs in *Ramirez-Martinez v. ICE*, along with other detainees,
 20 engaged in two forms of protected speech activities for which ICE retaliated against them: (1) a
 21 peaceful hunger strike; and (2) seeking to petition ICE administrators for redress about their
 22 grievances regarding national immigration policies and conditions at the NWDC.

24 i. *Hunger Strikes By Detainees Are First Protected First*
 25 *Amendment Activities.*

26 Courts have held that a hunger strike may be expressive conduct protected by the First
 27 Amendment in the prison setting "if it was intended to convey a particularized message." *Stefa-*

28 ² Under the Fifth Amendment, civil immigration detainees cannot be punished while in detention, and they cannot be
 29 subjected to punitive conditions. *Jones v. Blanas*, 393 F.3d 918, 933-34 (9th Cir. 2004), *cert. denied*, 546 U.S. 820
 (2005).

1 *noff v. Hays Cnty., Tex.*, 154 F.3d 523, 527 (5th Cir. 1998) (citing *Texas v. Johnson*, 491 U.S.
 2 397, 404 (1989)). Accordingly, hunger strikes even in prison constitute protected activity suffi-
 3 cient to support First Amendment retaliation claims. *See, e.g., Ajaj v. Fed. Bureau of Prisons*,
 4 No. 13-1010, 2014 WL 998413 (10th Cir. Mar. 17, 2014) (upholding the district court’s decision
 5 that Mr. Ajaj had adequately pled a First Amendment retaliation claim against a BOP employee
 6 for issuance of a disciplinary notice based on Mr. Ajaj’s participation in a hunger strike). *See*
 7 Dkt 2 at 9:1-10:24. Because of the expanded First Amendment rights held by Plaintiffs as civil
 8 detainees, their right to engage in peaceful hunger strikes is even more significant than that rec-
 9 ognized by courts addressing prison related actions.

11 ii. *Petitioning for Redress of Grievances Is Protected by the*
 12 *First Amendment.*

13 In addition to protecting participation in a hunger strike, the First Amendment also gives
 14 Plaintiffs the right to petition ICE authorities about the conditions of his confinement. *Lewis v.*
 15 *Casey*, 518 U.S. 343, 355 (1996). This First Amendment right includes the right to raise griev-
 16 ances with the courts, *id.*, and with detention administrators. *See Watison v. Carter*, 668 F.3d
 17 1108, 1114 (9th Cir. 2012). “Retaliation against prisoners for their exercise of this right is itself
 18 a constitutional violation, and prohibited as a matter of clearly established law.” *Brodheim v.*
 19 *Cry*, 584 F.3d 1262, 1269 (9th Cir. 2009) (citing *Rhodes*, 408 F.3d at 566).

20 (2) *ICE’s Placement of Plaintiffs in Solitary Confinement Constitutes*
 21 *an Adverse Action.*

22 Here, it is undisputed that ICE placed Plaintiffs in solitary confinement because they en-
 23 gaged in a hunger strike. *See Ramirez-Martinez Decl. Exhibit A; Gonzales Decl. Exhibit A;*
 24 *Uriostegui Decl. Exhibit A.* It has long been settled that a jailer’s efforts to punish a prisoner for
 25 speaking out about conditions in the jail is an actionable adverse action. *Hines v. Gomez*, 108
 26 F.3d 265, 269 (9th Cir. 1997) (ten-day confinement is sufficiently serious to support First
 27 Amendment retaliation claim); *Gray v. Hernandez*, 651 F. Supp. 2d 1167, 1175 (S.D. Cal. 2009)
 28 (placement in solitary confinement); *cf., Pratt v. Rowland*, 65 F.3d 802, 807 (9th Cir.1995)

1 (transfer and double-celling). Although ICE has released Plaintiffs from solitary confinement,
2 ICE has provided no assurances that it will not place Plaintiffs in solitary confinement in the fu-
3 ture should they engage in another hunger strike or seek to bring public awareness about national
4 immigration policies and conditions at the NWDC.

5
6 (3) *ICE Placed Plaintiffs in Solitary Confinement Because They En-
7 gaged in Protected First Amendment Activities.*

8 Considering the manner that ICE utilized to remove hunger striking detainees from the F-
9 3 unit, it is clear that ICE retaliated against Plaintiffs for speaking out about national immigration
10 policies and the conditions of their confinement at the NWDC. When deciding whether ICE took
11 the action *because of* the Plaintiffs' protected First Amendment conduct, a finder of fact may
12 make an inference of retaliatory motive based on the timing of officials' actions. *See King v.*
13 *Zamiara*, 680 F.3d 686, 695 (6th Cir. 2012) (holding that proximity in time between protected
14 conduct and retaliatory acts creates an inference of retaliation); *Tajeddini v. Gulch*, 942 F. Supp.
15 772, 779 (D. Conn. 1996) (refusing to grant summary judgment against prisoner with retaliatory
16 transfer claim based on timing of prison's actions).

17 Here, the timing of ICE's action against Plaintiffs creates such an inference of retaliation.
18 *See* Dkt. # 2. Plaintiffs began their hunger strike on March 24, 2014. *See* Gonzales Decl. ¶ 3;
19 Ramirez-Martinez Decl. ¶ 3; Uriostegui Decl. ¶ 3. On March 27, 2014, three days into their
20 strike, ICE corrections officers entered the F-3 unit and, although Plaintiffs and other detainees
21 from the F-3 unit had not been previously disciplined or warned that they might be disciplined
22 for being on a hunger strike, ICE arbitrarily chose to place approximately 20 detainees from the
23 F-3 unit in solitary confinement. Gonzales Decl. ¶¶5-10; Ramirez-Martinez Decl. ¶¶5-11; Urio-
24 stegui Decl. ¶¶5-10. ICE chose the detainees it placed in solitary confinement by asking detain-
25 ees if they wanted to speak with a warden about their concerns. *Id.* Those detainees who did
26 want to speak with an ICE official about their concerns were rounded up and thrown in solitary
27 confinement without notice or a hearing. *Id.* Thus far, ICE has not explained the reasons for its
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29

1 actions in any detail. *See* Gonzales Decl. Exhibit A; Ramirez-Martinez Decl. Exhibit A; Urioste-
2 gui Decl. Exhibit A.

3 Plaintiffs' claim that ICE is retaliating against detainees generally, and Plaintiff Gonzales
4 in particular, for engaging in protected speech is also belied by the timing of various recent
5 events including ICE's attempt to deport Plaintiff Gonzales. *See* Mungia Decl. Exhibit E. Plain-
6 tiff Gonzales began his hunger strike on March 24th; was placed in solitary confinement on
7 March 27th; his request for a stay of removal was denied on March 28th; Plaintiff Gonzales filed
8 this lawsuit, and ICE released him from solitary confinement on April 2nd; and on April 8th, ICE
9 provided Plaintiff Gonzales with less than 24 hours' notice of his imminent deportation.
10

11 The absence of any legitimate justification to support ICE's action and the clear temporal
12 link between ICE's actions and the protected speech activities of Plaintiffs are strong evidence of
13 ICE's retaliatory motive. *See Pratt*, 65 F.3d at 808 ("timing can properly be considered as cir-
14 cumstantial evidence of retaliatory intent").

15 (4) *ICE's Actions Chilled Plaintiffs' Exercise of their First Amend-*
16 *ment Rights.*

17 Even a limited restriction upon a detainee's First Amendment right is actionable. Indeed,
18 courts have found that locking someone in solitary confinement has a "chilling effect" on that
19 person's First Amendment rights and constitutes sufficient injury to support a retaliation claim.
20 *Gomez*, 108 F.3d at 269; *see also, Austin v. Terhune*, 367 F.3d 1167, 1171 (9th Cir. 2004) (pris-
21 oner stated claim for retaliation where he alleged that he was placed in segregation for filing
22 grievance); *Rhodes*, 408 F.3d at 568. The chilling effect of ICE's actions on speech is evident:
23 Plaintiffs stopped their hunger strikes after placement in solitary confinement out of fear of con-
24 tinued or additional retaliation by ICE.
25

26 (5) *ICE's Actions Do Not Reasonably Advance Any Legitimate Institu-*
27 *tional Goal.*

28 As detailed in Plaintiffs' declarations, they and the other detainees engaged in voluntary
29 hunger strikes that were free from coercion. Even though their actions did not interrupt the daily

1 functions of the facility, Plaintiffs were placed in solitary confinement. ICE simply locked them
2 away with little explanation. ICE then released them, again with no explanation to this court or
3 to Plaintiffs, except for perfunctory denials that it had done anything wrong. The lack of expla-
4 nation and paucity of evidence indicates that any reason ICE may articulate to support its deci-
5 sions is pretext to cover up its unlawful motivation.

6
7 b. *Removing Plaintiff Gonzales from the United States Will Cause Irrepara-*
8 *ble Harm to Him and the Other Plaintiffs.*

9 Plaintiff Gonzales will suffer irreparable harm if removed from the United States before
10 this case is resolved as deportation will allow ICE to deprive him of his ability to obtain mean-
11 ingful judicial review of ICE's violation of his constitutional rights, including declaratory relief
12 which would assure Plaintiff Gonzales that ICE will not retaliate against him and other detainees
13 for engaging in protected First Amendment speech. Furthermore, irreparable harm will occur
14 because Plaintiff Gonzales's deportation will also severely jeopardize the ability of the other
15 plaintiffs to prosecute this action, especially so early in the litigation when no discovery has tak-
16 en place.

17 c. *Issuance of a Stay of Plaintiff Gonzales's Removal Will Not Substantially*
18 *Injure ICE and Is Strongly in the Public's Interest.*

19 Courts often combine the "the third and fourth factors [of the standard for issuing a stay
20 by] assessing how a stay would affect the opposing party and the interest of the public [especial-
21 ly] where, as is the case here, the government is the opposing party." *Leiva-Perez v. Holder*, 640
22 F.3d 962, 970 (9th Cir. 2011). *See also Nken*, 556 U.S. at 435-36.

23 Here, the public interest impacted by issuance of a stay is strong and multifaceted. First,
24 there is a strong public interest in ensuring that private contractors of federal immigration deten-
25 tion facility are adequately trained and appropriately monitored to ensure that they do not run
26 roughshod over civil immigration detainees' constitutional rights. To ensure that all have access
27 to information needed to effectively participate in the national dialogue on immigration issues,
28 society needs to be certain that immigration detainees are not unconstitutionally stifled when en-
29

1 gaging in constitutionally protected speech aimed at raising public awareness about national im-
2 migration policies and conditions at immigration detention facilities. In addition, the First
3 Amendment protects civil immigration detainees' right to petition the courts to seek redress of
4 constitutional violations. This protection quickly becomes toothless if immigration officials are
5 allowed to deport detainees who bring valid claims before the court seeking to hold to hold im-
6 migration officials accountable for constitutional violations.

7
8 The public's interest in the issuance of stay is strong because of the chilling effect of al-
9 lowing ICE to deport an immigrant who seeks to vindicate his constitutional rights in a non-
10 frivolous lawsuit just days after filing his claim is likely to be felt across the larger immigrant
11 community, and is likely to impair the court's ability to obtain relevant evidence from this in-
12 stance as detained witnesses may be unlikely to willingly participate. The public interest in en-
13 suring that First Amendment protections aren't eviscerated by arbitrary or retaliatory immigra-
14 tion decisions is pressing, especially now that the national immigration debate is at a peak. Fi-
15 nally, the public has a strong interest in ensuring that matters brought before courts are effective-
16 ly adjudicated and that the ICE does not use its power to disrupt this process by removing immi-
17 grants who challenge the constitutionality of ICE's actions.

18
19 While the public interest is strong, the injury that ICE would suffer if it were not allowed
20 to immediately deport Plaintiff Gonzales is minor, if not hypothetical. ICE runs the NWDC
21 which houses approximately 1,300 detainees. Keeping Plaintiff Gonzales at this facility while
22 the stay is in effect cannot be considered a hardship to ICE. There may be a financial cost asso-
23 ciated with housing Plaintiff Gonzales at the facility, however considering the public interest in
24 ensuring that vulnerable immigrant detainees are not retaliated against for engaging in protected
25 speech, that cost is far outweighed by the public interest.

1 **B. This Court Has Authority to Issue a Stay of Plaintiff Gonzales’s Deportation to Re-**
 2 **tain Jurisdiction to Effectively Adjudicate Gonzales’s First Amendment Retaliation**
 3 **Claims.**

4 Generally, judicial review of removal orders is governed by 8 U.S.C. § 1252. The provi-
 5 sions of § 1252 limit a court’s ability to review immigration decisions and are intended to protect
 6 the exercise of Executive discretion in immigration matters. *See Reno v. American-Arab Anti-*
 7 *Discrimination Committee*, 525 U.S. 471, 486 (1999). No provision in the statute, however, pre-
 8 vents this Court from issuing a stay of Plaintiff Gonzales’s deportatino to maintain the Court’s
 9 jurisdiction over his First Amendment retaliation claims.

10 1. This Court Has Jurisdiction to Issue of a Stay of Plaintiff Gonzales’s Deportation.

11 Although 8 U.S.C. § 1252(g) provides, “no court shall have jurisdiction to hear any cause
 12 or claim by or on behalf of any alien arising from the decision or action by the Attorney General
 13 to commence proceedings, adjudicate cases, or execute removal orders against any alien under
 14 this chapter[.]” the Supreme Court has construed § 1242(g) narrowly holding that it “applies only
 15 to three discrete actions that the Attorney General may take: her ‘decision or action’ to ‘com-
 16 mence proceedings, *adjudicate* cases, or *execute* removal orders.” *Reno*, 525 U.S. at 482. Un-
 17 der the Supreme Court’s narrow reading of 8 U.S.C. § 1252(g), the statute does not bar a wide
 18 range of decisions or actions that the government may take in its enforcement of immigration
 19 laws, “such as the decisions to open an investigation, to surveil the suspected violator, to re-
 20 schedule the deportation hearing, to include various provisions in the final order that is the prod-
 21 uct of the adjudication, and to refuse reconsideration of that order.” *Id.* *See also Kwai Fun*
 22 *Wong v. United States*, 373 F.3d 952, 965 (9th Cir. 2004) (“§ 1252(g) does not bar review of the
 23 actions . . . to execute [a] removal order, such as . . . allegedly discriminatory decisions regarding
 24 advance parole, adjustment of status, and revocation of parole.”).

25 This Court is not jurisdictionally barred from hearing Plaintiffs’ Motion for Stay for from
 26 issuing relief that it deems necessary. This is because Plaintiffs’ request for a Motion for Stay
 27 does not implicate or challenge the legality of Defendants’ decision to deport Plaintiff Gonzales
 28 pursuant to a final order of removal, which would be barred by 8 U.S.C. § 1252(g). Instead,
 29

1 Plaintiffs' request for a stay of the deportation of Plaintiff Gonzales is a collateral matter neces-
2 sary for this Court to retain jurisdiction over the First Amendment retaliation claims and to en-
3 sure that the Court has the opportunity to receive all relevant and necessary evidence to effec-
4 tively adjudicate these claims against Defendants. As such, this Court has jurisdiction to hear
5 Plaintiffs' Motion for Stay and to issue the stay requested.

6
7 2. This Court Has Authority to Issue a Stay of Plaintiff Gonzales's Deportation.

8 The All Writs Act grants this Court authority to issue a stay of Plaintiff Gonzales's de-
9 portation. 28 U.S.C. § 1651. Courts are barred by 8 U.S.C. § 1252(f)(2) enjoining "the removal
10 of any alien pursuant to a final order under this section unless the alien shows by clear and con-
11 vincing evidence that the entry or execution of such order is prohibited as a matter of law[.]"
12 However, the prohibitions codified at 8 U.S.C. § 1252(f)(2) do not impose such a requirement on
13 the issuance of stays. Indeed, the Supreme Court has held that § 1252(f) does not prohibit a
14 court from issuing a stay of the execution of a final order of removal if "'necessary or appropri-
15 ate in aid of [a court's] jurisdiction[] and agreeable to the usages and principles of law.'" *Nken*,
16 556 U.S. at 426 (quoting All Writs Act, 28 U.S.C. § 1651(a)). It came to its conclusion, that
17 courts are not barred by § 1252(f) from issuing stays, in part because Section 1252(f)(2) "does
18 not by its terms refer to 'stays' but instead to the authority to 'enjoin the removal of any alien.'" *Id.*
19 at 428.

20
21 This distinction is important because "[a]n injunction and a stay have typically been un-
22 derstood to serve different purposes." *Id.* Where an injunction "is a means by which a court tells
23 someone what to do or not to do," "a stay operates upon the judicial proceeding itself . . . by halt-
24 ing or postponing some portion of the proceeding, or by temporarily divesting an order of en-
25 forceability." *Id.* Such a stay is a "temporary setting aside of the source of the Government's
26 authority to remove" "by returning to the status quo—the state of affairs before the removal or-
27 der was entered" and therefore markedly different than an injunction. *Id.* at 429. *See also id.* at
28 430 n.1 ("The relief sought here is properly termed a 'stay' because it suspends the effect of the
29

1 removal order.”). It also must be noted that Congress seemed to acknowledge this distinction be-
 2 tween a stay and an injunction when it drafted this statutory scheme. *See id.* at 428 (Section
 3 1252(f)(2) “does not by its terms refer to ‘stays’ but instead to the authority to ‘enjoin the re-
 4 moval of any alien’” and “when Congress wanted to refer to a stay pending adjudication of a pe-
 5 tition for review in § 1252, it used the word ‘stay.’”). Indeed, Section 1252(f) “says nothing
 6 about stays, but is instead titled ‘Limit on injunctive relief,’ and refers to the authority of courts
 7 to ‘enjoin the removal of any alien.’” *Id.* (quoting § 1252(f) and concluding that § 1252(f)(2)
 8 does not cover stays).
 9

10 Consistent with *Nken*, Plaintiffs’ request for a stay of the deportation of Plaintiff Gonza-
 11 les’s is not barred by 8 U.S.C. § 1252(f)(2), and this Court may issue a stay to preserve its own
 12 jurisdiction if Plaintiff Gonzales meets the standards typically utilized by courts to determine
 13 whether a stay is necessary. 556 U.S. at 443. Because Plaintiff Gonzales has established the ele-
 14 ments of a stay, issuance of a stay by this Court is appropriate.

15 IV. CONCLUSION

16 Based on the foregoing, this Court should issue a stay of Plaintiff Gonzales’s deportation.

17 DATED: April 21, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2014, I electronically filed the foregoing Motion for Stay of Plaintiff Gonzales’s Deportation with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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