No. 24A949

IN THE

Supreme Court of the United States

KRISTI NOEM, SECRETARY OF HOMELAND SECURITY, ET AL.,
Applicants,

v.

KILMAR ARMANDO ABREGO GARCIA, ET AL.,
Respondents.

OPPOSITION TO APPLICATION TO VACATE THE INJUNCTION ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND AND REQUEST FOR AN IMMEDIATE ADMINISTRATIVE STAY

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STATEMENT

This case is one of one. It presents the "extraordinary circumstances" of the Government conceding that it erred in removing Kilmar Armando Abrego Garcia "to a foreign country for which he was not eligible for removal." *Abrego Garcia v. Noem*, No. 25-1345, 2025 WL 1021113, at *6 (4th Cir. Apr. 7, 2025) (Wilkinson, J. concurring). The Government knew about the court order prohibiting Abrego Garcia's removal to El Salvador, and admits that removing him in violation of that order was an "administrative error." *Id.* at *1 (Thacker, J., with King, J., concurring). Abrego Garcia has never been charged with a crime, in any country. He is not wanted by the Government of El Salvador. He sits in a foreign prison *solely* at the behest of the United States, as the product of a Kafka-esque mistake.

The Government "can—and does—return wrongfully removed migrants as a matter of course," *id.* at *4 (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009) (noting that removed individuals "can be afforded effective relief by facilitation of their return")). The district court's order instructing the Government to facilitate Abrego Garcia's return is routine. *See Abrego Garcia*, 2025 WL 1021113, at *4 n.7 (Thacker, J., with King, J., concurring) (collecting cases). It does not implicate foreign policy or even domestic immigration policy in any case. The United States has never claimed that it is powerless to correct its error and before today, it did not contend that doing so would cause it any harm. That is because the only one harmed by the current state of affairs is Abrego Garcia.

The Government is unlikely to succeed on the merits of the case. Its application to this Court is built on a series of strawmen: first, that ordering the Government to

facilitate Abrego Garcia's return requires "compel[ling] El Salvador to follow a federal judge's bidding," App. at 2; second, that the district court lacks jurisdiction over this case under 8 U.S.C. §1252(g) based on a "decision or action by the Attorney General to . . . execute removal orders against any alien," *id.* at 3; and third, that complying with the order requires letting "a member of a foreign terrorist organization into America tonight," *id.* None of this is true.

Requiring the Government to facilitate Abrego Garcia's return is not novel, nor does doing so empower district courts with "extraterritorial jurisdiction over the United States' diplomatic relations with the whole world." *Id*. at 2. The district court's order does nothing more than demand that the Government "correct its own admitted error," and thereby "vindicate[] the interests of courts in upholding the respect due the fundamental value of human law." *Abrego Garcia*, 2025 WL 1021113, at *8 (Wilkinson, J. concurring). The record of this case makes clear that Abrego Garcia is a "detainee of the United States Government, who is being housed temporarily in El Salvador." *Id.* at *4 (Thacker, J., with King, J., concurring). The district court's order "does not require the United States to demand anything of a foreign sovereign." *Id*. There is no dispute that Abrego Garcia is *only* in El Salvador because the United States sent him there. There is likewise no dispute that he is being held *only* because the United States has requested that he be held. And there is *no* evidence in the record of this case supporting the Government's contention that it cannot bring him back. The district court's order requires nothing more than that the Government "exercise the authority and control it must have retained over the detainees it is temporarily housing in El Salvador." *Id.*

The Government's contention that courts lack jurisdiction to order it to return an individual wrongfully removed *in defiance* of a court order is "unconscionable." *Id.* at *1. As Judge Wilkinson noted in his concurrence this morning, this "is a path of perfect lawlessness, one that courts cannot condone." *Id.* at *7 (Wilkinson, J. concurring). It is also simply wrong. There is no valid order authorizing removal to El Salvador in this case. Rather, there is a valid order *withholding* his removal to that country. "Thus the government here took the only action which was expressly prohibited." *Id.* at *6. And the Government *conceded* that fact below: the purported removal order—which appears nowhere in the record—"could *not* be used to send Mr. Abrego Garcia to El Salvador." SA102[1] (emphasis added). The Attorney General could not lawfully have decided to execute an invalid order, nor could she divest the courts of jurisdiction by doing so.

The Government's hyperbolic references to terrorism offer no support for its claims. The record of this case shows Abrego Garcia to be "a gainfully employed family man who lives a law abiding and productive life." *Abrego Garcia*, 2025 WL 1021113, at *5 (Thacker, J., with King, J., concurring). And an Article II immigration judge found him to be credible, and concluded that he was the *victim* of gang violence in El Salvador, where he faces "a clear probability of future persecution." SA008.

Nor do the Government's bald assertions provide support for its belated contention—made for the first time in its application to this Court—that the injunction threatens irreparable harm to the public. Abrego Garcia has lived freely in the United

[1] "SA" refers to the Respondents' Supplemental Appendix filed in the Fourth Circuit.

States for years, yet has never been charged for a crime. The Government's contention that he has suddenly morphed into a dangerous threat to the republic is not credible.

The Executive branch may not seize individuals from the streets, deposit them in foreign prisons in violation of court orders, and then invoke the separation of powers to insulate its unlawful actions from judicial scrutiny. "Broad powers are not 'unbounded' powers." *Abrego Garcia*, 2025 WL 1021113, at *8 (Wilkinson, J., concurring) (citation omitted).

The Government's application to vacate the injunction and its request for an administrative stay should be denied and the Government should be required to facilitate Abrego Garcia's immediate return to halt the ongoing irreparable harm he suffers and advance the public interest in the proper administration of justice.

FACTUAL AND PROCEDURAL HISTORY

For years, Kilmar Armando Abrego Garcia lived in Beltsville, Maryland, with his wife, Plaintiff Jennifer Stefania Vasquez Sura (a U.S. citizen), and their three special needs children: D.T.V., X.T.V., and Plaintiff A.A.V. (all U.S. citizens). SA015; SA021. Abrego Garcia, a citizen of El Salvador, came to the United States as a teenager to escape gang violence targeting his family. SA002-003; SA145-146. He has never been charged with any crime. SA147; SA018; SA021.

In 2019, the Government commenced removal proceedings. SA146. Abrego Garcia moved for release on bond. SA146. The Government opposed, claiming he was an MS-13 gang member. SA146. The Government offered two pieces of "evidence": first, Abrego Garcia was wearing "his Chicago Bulls hat and hoodie," and second, "a vague, uncorroborated allegation from a confidential informant claiming he belonged

to MS-13's 'Western' clique in New York—a place he has never lived." SA146 n.5; Add010-011.[2] The immigration judge was "reluctant to give evidentiary weight to the Respondent's clothing as an indication of gang affiliation," but nevertheless refused to release Abrego Garcia on bond. Add047-048; SA146.

Abrego Garcia then sought relief from removal. SA001-002. During a full evidentiary hearing, Abrego Garcia offered his own sworn testimony, that of his wife, Vasquez Sura, and voluminous evidence showing he was not a gang member and was eligible for protection under federal law. SA002-004; SA017.

The immigration judge ordered withholding of removal on October 10, 2019. SA014. The judge found Abrego Garcia "credible," observing that his "testimony was internally consistent, externally consistent" with the "substantial documentation," and "appeared free of embellishment." SA005. The judge further found that there was "a clear probability of future persecution" if Abrego Garcia returned to El Salvador. SA008. The judge therefore ordered that Abrego Garcia had the "right not to be deported" to El Salvador under 8 U.S.C. §1231(b)(3)(A). SA006; SA014. The Government never appealed that order, so it became final. SA147. Since 2019, Abrego Garcia has lived with his family in Maryland, working full time as a union sheet metal worker and dutifully appearing for annual check-ins with immigration authorities (most recently in January 2025). SA147.

On March 12, 2025, Abrego Garcia was arrested in front of his five-year old son, A.A.V., by ICE officers who falsely told him that his "status had changed." SA147; SA019. Three days later, Abrego Garcia was allowed to tell his wife that he was being

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[2] "Add." refers to the Government's Addendum filed in the Fourth Circuit.

deported to the Terrorism Confinement Center **(CECOT)** in El Salvador. SA020-021. Vasquez Sura has not heard from her husband since—but she has seen him in news photographs and videos of prisoners at CECOT. SA021-022.

On March 24, Plaintiffs filed suit and moved for a temporary restraining order. SA150. The Complaint and motion seek the same relief: "ordering Defendants to take all steps reasonably available to them, proportionate to the gravity of the ongoing harm, to return Plaintiff Abrego Garcia to the United States." Add024.

The Government opposed that request, despite acknowledging that Abrego Garcia's removal to El Salvador—which violated the 2019 order that granted withholding of removal—was an "administrative error." SA046; Add053. ICE Field Office Director Robert L. Cerna admitted that "ICE was aware of this grant of withholding of removal at the time Abrego-Garcia's removal from the United States." Add053. After Plaintiffs filed their Complaint, Defendant Kristi Noem visited CECOT but took no steps to secure Abrego Garcia's return. SA040.

The district court held a hearing on April 4. At the hearing, the Government "concede[d] the facts"—that "the plaintiff, Abrego Garcia, should not have been removed." SA098.

At the end of the hearing, the court entered identical written and oral orders granting Plaintiffs' motion, which it construed as seeking a preliminary injunction. Add001. In its written opinion, it found that Abrego Garcia's removal to El Salvador was "wholly lawless," SA149, and that "U.S. officials secured his detention in a facility that, by design, deprives its detainees of adequate food, water, and shelter, fosters routine violence; and places him with his persecutors," SA165. The court ordered the

Government to "facilitate and effectuate the return" of Abrego Garcia by "11:59 PM on Monday, April 7, 2025." Add002.

The Government noticed an appeal to the Fourth Circuit, SA143, and sought to stay the district court's order. The Fourth Circuit unanimously rejected that request. *Abrego Garcia*, 2025 WL 1021113, at *1 (Thacker, J., with King, J., concurring); *id.* at *6 (Wilkinson, J., concurring).

STANDARD OF REVIEW

Parties seeking emergency relief in this Court after the Court of Appeals has already "denied a motion for a stay" bear "an especially heavy burden." *Edwards v. Hope Med. Grp. for Women*, 512 U.S. 1301, 1302 (1994) (Scalia, J., in chambers) (quoting *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320 (1994) (Rehnquist, C.J., in chambers)); *accord Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2618 (2020) (Roberts, C.J., with Alito, Gorsuch, Kavanaugh, JJ., concurring in the grant of stay). This Court grants relief "only upon the weightiest considerations," especially where, as here, "a stay has been denied by the District Court *and* by a unanimous panel of the Court of Appeals." *Packwood*, 510 U.S. at 1320 (emphasis added and quotation marks omitted).

In determining whether to stay or vacate an order, the Court considers "(1) whether the applicant is likely to succeed on the merits, (2) whether it will suffer irreparable injury without a stay, (3) whether the stay will substantially injure the other parties interested in the proceedings, and (4) where the public interest lies." *Ohio v. EPA*, 603 U.S. 279, 291 (2024) (citing *Nken*, 556 U.S. at 434) (stay); *accord Ala. Ass'n of Realtors v. HHS*, 594 U.S. 758, 766 (2021) (vacatur).

In addition to these four factors, an applicant must establish "a reasonable probability" that this Court will eventually grant certiorari. *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 572 U.S. 1301, 1301 (2014) (Roberts, C.J., in chambers); *see also Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam).

ARGUMENT

I. The Government Does Not Satisfy The Standard For Vacatur Of The District Court's Injunction, Stay, Or A Stay Pending Appeal

A. The Government Has Not Made A Strong Showing Of Likelihood Of Success On The Merits

The Government conceded at the hearing below that its "only arguments are jurisdictional. We have nothing to say on the merits. We concede he should not have been removed to El Salvador." SA104. The Government's jurisdictional arguments do not constitute the requisite "strong showing" of likely success on the merits.

1. The District Court's Order Is A Proper Exercise Of Judicial Power

The Government's main argument (at 12) is that the order below "is an abuse of judicial power." That is wrong.

The district court properly ordered the Government to "facilitate and effectuate" Abrego Garcia's return by "11:59 PM on Monday, April 7, 2025." Add002. Contrary to the Government's assertion (at 12-13), Plaintiffs did not "disclaim[]" such relief; rather, they requested it. SA088 (arguing that the Court has "jurisdiction to order them to facilitate his return, and what we would like is for the Court to enter that order"); *see also* SA085-087; SA074-075; Add024.

The district court issued this order because it found, among other things, that "Abrego Garcia was removed to El Salvador in violation of the Immigration and

Nationality Act, specifically 8 U.S.C. §1231(b)(3)(A), and without any legal process." Add002; *see also* SA149 ("[T]here were no legal grounds whatsoever for his arrest, detention, or removal."). This finding follows from the Government's concession that it unlawfully removed Abrego Garcia, *see* SA098 ("The facts—we concede the facts. This person should—the plaintiff, Abrego Garcia, should not have been removed. That is not in dispute."); SA104 ("We concede he should not have been removed to El Salvador."), and from the Government's admission that there was no evidence that a lawful process led to the removal, SA100.

The Government's contentions (at 13-15) that the district court's order improperly encroached on the Executive's prerogative to manage foreign affairs are unavailing. Courts routinely exercise jurisdiction to protect individual rights, including in immigration cases, without impinging on the Executive's ability to conduct foreign affairs. "[A]n area concerning foreign affairs that has been uniformly found appropriate for judicial review is the protection of individual or constitutional rights from government action." *Flynn v. Shultz*, 748 F.2d 1186, 1191 (7th Cir. 1984) (collecting authorities).

Courts also routinely order the Government to return, or facilitate the return, of individuals the Government wrongly removed to foreign countries—including El Salvador. *See, e.g.*, *Ramirez v. Sessions*, 887 F.3d 693, 707 (4th Cir. 2018) (directing Government "to facilitate Ramirez's return to the United States" from El Salvador); *Gordon v. Barr*, 965 F.3d 252, 261 (4th Cir. 2020) (similar); *Nunez-Vasquez v. Barr*, 965 F.3d 272, 287 (4th Cir. 2020) (directing Government "to return Nunez-Vasquez to the United States"); *Orabi v. Att'y Gen.*, 738 F.3d 535, 543 (3d Cir. 2014) (similar). The

Government returns "wrongfully removed migrants as a matter of course." SA153; *see Nken*, 556 U.S. at 435 (discussing how removed individuals "can be afforded effective relief by facilitation of their return"); *Lopez-Sorto v. Garland*, 103 F.4th 242, 249-53 (4th Cir. 2024) (discussing ICE policy to facilitate returns).

The Fourth Circuit ruled two years ago that if a person removed to El Salvador is later awarded withholding of removal, then "the DHS and the Attorney General should swiftly 'facilitate his return to the United States' from El Salvador." *Garcia v. Garland*, 73 F.4th 219, 234 (4th Cir. 2023) (quoting *Ramirez*, 887 F.3d at 706). Here, Abrego Garcia *already* has been awarded withholding of removal and the Government concedes his removal in violation of that court order was erroneous. By vindicating Abrego Garcia's individual rights consistent with *Nken*, *Ramirez*, *Gordon*, *Nunez-Vasquez*, and *Garcia*, the district court acted within its authority.

The Government's "impossibility" argument (at 15-16) fares no better. The Government contends that it is "impossible" to facilitate Abrego Garcia's return by the court-imposed deadline of midnight tonight—though, if so, that is only because the Government has delayed. And the Government's unsupported claim is not credible. It was not impossible for the Government to effectuate Abrego Garcia's removal to El Salvador within 72 hours of his seizure by ICE. And it is surely equally possible for the Government to fly the same planes in the opposite direction.

The Government's insinuation that it lacks the ability to retrieve Abrego Garcia is likewise unsupported by any record evidence, as the Government *conceded* below. The district court asked: "why can't the United States get Mr. Abrego Garcia back"? SA114. The Government responded: "[W]hen this case landed on my desk, the first

thing I did was ask my clients that very question. I've not received, to date, an answer that I find satisfactory." SA114. There is no evidence in the record that supports the assertion that it is impossible for the United States to get Abrego Garcia back. That absence alone dooms the Government's motion.

In fact, the undisputed evidence shows that the Government *can* return Abrego Garcia. SA155. Abrego Garcia is being held in CECOT only because the U.S. Government is paying El Salvador $6 million to hold him (and others) there. SA148-149. As Defendant Kristi Noem, the Secretary of Homeland Security, stated, CECOT is "is one of the tools in *our* [the United States'] toolkit that we will use if you commit crimes against the American people." SA149; SA155. The U.S. Government functionally controls Abrego Garcia's detention—it has simply contracted with El Salvador to be the jailer.[3] As the district court put it: "[Y]ou have an agreement with this facility where you're paying the money to perform a certain service. And so it stands to reason that you can go to the payee and say, we need one of our detainees back." SA127; *see also* SA155 ("[J]ust as in any other contract facility, Defendants can and do maintain the power to secure and transport their detainees, Abrego Garcia included.").

Indeed, the Government is correct to note (at 16-17) that ICE has a directive regarding facilitating the return of lawfully removed aliens from outside the United States. Rather than limiting the activities that might facilitate an alien's return, the

[3] ICE routinely pays other governmental entities to hold detainees. *See, e.g.*, U.S. Gov't Accountability Office, *Immigration Detention* (Jan. 2021), https://www.gao.gov/assets/gao-21-149.pdf, at PDF page 2 (showing 59% of ICE detainees housed under an intergovernmental service agreement), cited in SA070.

directive empowers ICE to "engage in activities which allow" an alien to "travel to the United States" and to "parole the alien into the United States upon his or her arrival at a U.S. port of entry." Although facilitating such return "does not ***necessarily*** include ... making flight arrangements for the alien," the policy suggests flight arrangements for a return trip are sometimes necessary. And DHS and DOJ (FBI) routinely operate abroad, with hundreds of international employees and offices in San Salvador (ICE, USCIS, CBP, and FBI all have offices) that directly interact with Salvadoran officials daily. Their role abroad is to coordinate with international counterparts in executing the nation's missions, including the "fair and effective" execution of "immigration laws." Dep't of Homeland Sec., *The Life Saving Missions of ICE*, (Aug. 20, 2018), https://tinyurl.com/4a84hj6n. The speculative possibility that their efforts might fail does not preclude the courts from mandating by injunction that these agencies "vigorously" facilitate the return of Abrego Garcia. *Robertson v. Jackson*, 972 F.2d 529, 535 (4th Cir. 1992) (rejecting impossibility defense to injunction where Government had not shown impossibility).

The court offered the Government the opportunity to submit contrary evidence. *E.g.*, SA120. The Government chose not to. Its attorney stated at the hearing: "the government made a choice here to produce no evidence," SA120, and his "clients understand that the absence of evidence speaks for itself," SA128. The record lacks any evidence that the Government has even *attempted* to seek Abrego Garcia's return. That is the furthest thing from a "strong showing" that the Government is likely to prevail on its impossibility argument.

2. Section 1252(g) Does Not Bar Jurisdiction

As the Fourth Circuit explained, the Supreme Court has made clear that 8 U.S.C. §1252(g) "strips the federal courts of jurisdiction only to review the Attorney General's exercise of lawful discretion to commence removal proceedings, adjudicate those cases, and execute orders of removal." *Abrego Garcia*, 2025 WL 1021113, at *2 (Thacker, J., with King, J., concurring) (citing *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999)). In other words, the necessary inquiry here is whether "the Attorney General removed Abrego Garcia pursuant to a *lawful* order of removal." *Id.* (emphasis added). The clear answer is no.

Here, "the Attorney General's decision to remove Abrego Garcia to El Salvador was not one that was within her lawful discretion." *Abrego Garcia*, 2025 WL 1021113, at *3 (Thacker, J., with King, J., concurring). The record contains an order that *prohibits* the Government from removing Abrego Garcia to El Salvador. SA001-014. Because of that order, the Government conceded below that any removal order "could not be used to send Mr. Abrego Garcia to El Salvador." SA102. Whatever authority the Government purported to be acting under when it removed Abrego Garcia to El Salvador, it was not executing a removal order under Title 8, Chapter 12. SA157. Section 1252(g) is therefore inapplicable. *See Enriquez-Perdomo v. Newman*, 54 F.4th 855, 865 (6th Cir. 2022) (holding §1252(g) inapplicable "when a removal order is not subject to execution").

Even assuming Abrego Garcia's removal was pursuant to the execution of a removal order, §1252(g) would still be inapplicable. Section 1252(g) "strip[s] the federal courts of jurisdiction only to review challenges to the Attorney General's decision to

exercise her *discretion* to initiate or prosecute these specific stages in the deportation process," including "execut[ing] removal orders." *Bowrin v. INS*, 194 F.3d 483, 488 (4th Cir. 1999); *see also Madu v. Att'y Gen.*, 470 F.3d 1362, 1368 (11th Cir. 2006) ("section 1252(g) does not apply" to a challenge raising a non-discretionary bar to removal). Here, the order barring Abrego Garcia's removal to El Salvador was mandatory, not discretionary, so §1252(g) does not apply. SA157-158; *see also Kong v. United States*, 62 F.4th 608, 618 (1st Cir. 2023) (§1252(g) inapplicable where claim did not arise from "discretionary decision to execute removal"); *Arce v. United States*, 899 F.3d 796, 800 (9th Cir. 2018) ("§1252(g) is simply not implicated" when "the Attorney General totally lacks the discretion to effectuate a removal order.").

The cases the Government cites are inapposite. Neither *Silva v. United States*, 866 F.3d 938 (8th Cir. 2017), nor *Foster v. Townsley*, 243 F.3d 210 (5th Cir. 2001) involved a withholding of removal order. And *Johnson v. Guzman Chavez*, 594 U.S. 523 (2021), concerned 8 U.S.C. §§1226 and 1231; it says nothing about §1252(g).

B. The Government Does Not Show Irreparable Harm

One of the "most critical" *Nken* factors is "whether the applicant will be irreparably injured absent a stay." 556 U.S. at 434. The Court will not grant emergency relief in the absence of the applicant's satisfactory showing of irreparable harm. *See, e.g.*, *Teva Pharms.*, 572 U.S. at 1301 (2014) (Roberts, C.J., in chambers). But here, the Government "made no argument whatsoever that it would suffer irreparable harm in the absence of a stay" before the lower courts. *See Abrego Garcia*, 2025 WL 1021113, at *5 (Thacker, J., with King, J., concurring). That failure alone was "fatal to the Government's request for a stay" below, *id.*, and likewise should be fatal to its

application to this Court. *See, e.g.*, *Hollingsworth*, 558 U.S. at 190 (applicant for stay "must show … a likelihood that irreparable harm will result from the denial of a stay"); *Murthy v. Missouri*, 144 S. Ct. 7, 8 (2023) (Alito, J., dissenting from grant of application of stay) ("[T]he Government must prove that irreparable harm is 'likel[y].'") (quoting *Hollingsworth*, 558 U.S. at 190); *see also Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 455 (2007) ("[W]e ordinarily do not consider claims that were neither raised nor addressed below.").

Before this Court, the Government's minimal (and belated) attempts to show irreparable harm (at 23-24) do not satisfy this high bar. Repeating its redressability arguments, the Government first argues (at 23) that the district court's injunction "plac[es] the conduct of foreign relations under judicial superintendence." Not so. As previously explained, the court's order is consistent with well-established caselaw directing the Government to return, or facilitate the return, of wrongly removed individuals, and therefore such an order does not irreparably injure the Government. *See, e.g.*, *Nken*, 556 U.S. at 435; *Ramirez*, 887 F.3d at 707.

The Government also argues (at 22-23) that the injunction "threatens irreparable harm to the public" by "directing the return" of an alleged "member of MS-13 to the United States." This argument fails for two reasons. First, the Government has conceded that Abrego Garcia "should not have been removed." SA098. Directing the Government to undo its error by bringing Abrego Garcia back is no injury at all, let alone irreparable injury—it simply restores the status quo before Abrego Garcia's unlawful removal. The claims in this case challenge Abrego's *removal*, not his *confinement*. SA151. Second, as detailed below, the public interest is in preventing and

correcting wrongful removals. *Nken*, 556 U.S. at 436. Once Abrego Garcia is back in the United States, the Government can follow the available procedures in an immigration court to pursue its assertions of gang membership and challenge the withholding of removal. And third, Abrega Garcia has lived freely in the United States *for years* without incident. The Government offers no evidence that he has become a threat overnight.

C. Vacatur Would Substantially Injure Plaintiff Abrego Garcia

The Government argues (at 23-24) that the harm Abrego Garcia incurs by his continued unlawful detention in a dangerous prison, in a country where he is likely to suffer persecution, is not "irreparable." The Government is mistaken in two respects. *First*, the third *Nken* factor examines whether the stay will "substantially injure" Abrego Garcia, not whether it will "irreparably" injure him. *See Nken*, 556 U.S. at 434. Demonstrating that harm is "irreparable" is required of the party *seeking* emergency relief—a demonstration that the Government has failed to make.

Second, "[t]he irreparable harm in this case is the harm being done to Abrego Garcia every minute he is in El Salvador." *Abrego Garcia*, 2025 WL 1021113, at *6 (Thacker, J., with King, J., concurring). As the immigration judge found when granting Abrego Garcia withholding of removal, Abrego Garcia faces "a clear probability of future persecution" in El Salvador. SA008. The Government defied that order by removing Abrego Garcia to El Salvador in violation of his statutory and due process rights. SA160-162; SA104 ("We have nothing to say on the merits. We concede he should not have been removed to El Salvador."). The deprivation of constitutional rights, "for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Roman Cath. Diocese*

of Brooklyn v. Cuomo, 592 U.S. 14, 19 (2020) (per curiam) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality op.)).

More pressingly, Abrego Garcia is incarcerated in CECOT, "one of the most dangerous prisons in the Western Hemisphere," SA145, where he is subject to "some of the most inhumane and squalid conditions known in any carceral system." SA148. Detainees in CECOT face "the risk of torture, beatings, and even death," which "clearly and unequivocally supports a finding of irreparable harm." *J.G.G. v. Trump*, 2025 WL 890401, at *16 (D.D.C. Mar. 24, 2025). As the district court found, "the risk of harm shocks the conscience." SA163.

D. The Public Interest Favors Denying The Application

Finally, the public interest weighs heavily in favor of denying the relief the Government requests. The Court recognized in *Nken* that "there is a public interest in preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm." 556 U.S. at 436. That is the exact situation Abrego Garcia is in: the immigration judge ordered withholding of removal precisely because Abrego Garcia faces persecution in El Salvador, SA008; SA013. Thus, as the district court found, "the balance of equities and the public interest weigh in favor of returning him to the United States." Add002; SA164-165.

The Government concedes (at 25) the public interest articulated in *Nken*, but argues that the interest is "diminished . . . by the harm that the district court's injunction threatens to cause the government and the public." As Judge Thacker opined below, "[a]n unsupported—and then abandoned—assertion that Abrego Garcia was a member of a gang, does not tip the scales in favor of removal in violation of this

Administration's own withholding order. If the Government wanted to prove to the district court that Abrego Garcia was a 'prominent' member of MS-13, it has had ample opportunity to do so but has not—nor has it even bothered to try." *Abrego Garcia*, 2025 WL 1021113, at *5 (Thacker, J., with King, J., concurring).

Fundamentally, "there is the highest public interest in the due observance of all the constitutional guarantees." *United States v. Raines*, 362 U.S. 17, 27 (1960). Indeed, "the Government cannot be permitted to ignore the Fifth Amendment, deny due process of law, and remove anyone it wants, simply because it claims the victims of its lawlessness are members of a gang." *Abrego Garcia*, 2025 WL 1021113, at *6 (Thacker, J., with King, J., concurring). Likewise, the Government must follow the orders of its immigration courts, or such orders and courts become meaningless. When, as here, the Government admitted error, the public interest lies in correcting that error, not prolonging it.

E. The Government Does Not Show A Reasonable Probability The Court Will Grant Certiorari

The Government contends (at 22) that the issues raised warrant this Court's review. But the Government does little more than repeat the grounds upon which it relies to argue that it is likely to succeed on the merits. None are availing. The Government fails to identify any favorable authority supporting its position: that a individual deprived of due process and unlawfully removed to a foreign prison by the United States Government is left without recourse to correct this unconscionable mistake. *See Hollingsworth*, 558 U.S. at 190 (providing applicant must show a reasonable probability the issue is "sufficiently meritorious" to grant certiorari). On the contrary, as the Fourth Circuit noted in denying the Government's stay, the granted

relief is "not a novel order." *Abrego Garcia*, 2025 WL 1021113 at *4 & n.7 (Thacker, J., with King, J., concurring) (collecting cases).

The Government also claims (at 13) that this Court's review is warranted because the district court's order "gravely offends the separation of powers," but its bogeyman of a constitutional crisis is incorrect. Here, the district court provided the routine relief of protecting the Due Process right of a resident of this country and correctly recognized that the Executive branch may not cite its Article II authority for the proposition that courts are "powerless to redress" a constitutional violation, for that would be "a path of perfect lawlessness, one that courts cannot condone." *Abrego Garcia*, 2025 WL 1021113, at *7 (Wilkinson, J., concurring). It is well established that broad powers are not "unbounded" powers, *see Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 20 (2015), and this Court has adopted a "flexible understanding of separation of powers." *Mistretta v. United States*, 488 U.S. 361, 381 (1989). The district court's order requiring the Government to "facilitate and effectuate" the return of Abrego Garcia merely requires the Government to correct its own admitted error, thereby ensuring that the President fulfills his obligation to "take care that the Laws be *faithfully* executed." U.S. CONST. art II, § 3 (emphasis added); *see also Powell v. McCormack*, 395 U.S. 486, 506 (1969) (stating that it is "the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government ... have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void.").

II. An Administrative Stay Would Be Improper

The "point" of an administrative stay is "to minimize harm while an appellate court deliberates, so the choice to issue an administrative stay reflects a first-blush judgment about the relative consequences of staying the lower court judgment versus allowing it to go into effect." *United States v. Texas*, 144 S. Ct. 797, 798 (2024) (Barrett, J., concurring in the denial of applications for stay). The *Nken* factors "can influence the stopgap decision, even if they do not control it." *Id.* at 799.

Here, the path to minimize harm is to deny an administrative stay. Every moment Abrego Garcia remains in El Salvador constitutes "irreparable harm" to him. Add002; SA163-164. An administrative stay that prolongs his time in El Salvador will *inflict*, rather than *minimize*, harm. Detainees in CECOT face "the risk of torture, beatings, and even death," *J.G.G.*, 2025 WL 890401, at *16, while being "denied communication with their relatives and lawyers," Add025. The Government identifies no countervailing harm sufficient to outweigh the grave and irreparable harm Abrego Garcia suffers daily. These reasons to deny an administrative stay are bolstered by the *Nken* factors, which, cut decisively against any stay. *See Texas*, 144 S. Ct. at 799.

CONCLUSION

The Court should deny the Government's application.

Respectfully submitted,

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