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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

Santiago Arrieta Sebastiani,  
Petitioner.  
vs.  
Eric H. Holder, Jr., et al.,  
Respondents.

) No. CV 10-0898-PHX-DGC (ECV)

**ORDER**

Petitioner Santiago Arrieta Sebastiani (A087-907-202), who is represented by counsel, has filed a Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 (Doc. #1) and an Emergency Motion for a Temporary Restraining Order and/or Preliminary Injunctive Relief (Doc. #2).<sup>1</sup> The Court will deny the Motion and dismiss the Petition for lack of jurisdiction.

**I. Petition**

Petitioner is a native and citizen of Uruguay. On April 4, 2003, when he was fourteen years old, he entered the United States under the Visa Waiver Program (VWP).<sup>2</sup> On March

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<sup>1</sup> This case is assigned to District Judge David G. Campbell. Because Judge Campbell is unavailable to hear Petitioner’s Emergency Motion, the motion was randomly assigned to the undersigned.

<sup>2</sup> The VWP authorizes a 90-day stay without a visa in exchange for a waiver of the right to challenge any removal action except on the basis of asylum. 8 U.S.C. § 1187(a)(1) and (b).

1 4, 2010, Petitioner was arrested in California on a bench warrant for failure to comply with  
2 a state sentencing order in connection with his 2007 California petty theft conviction.  
3 Petitioner was transferred to the custody of Immigration and Customs Enforcement (ICE) and  
4 is now being held without bond in the Service Processing Center in Florence, Arizona.

5 On March 5, 2010, ICE Assistant Field Officer Michael Vaughn issued an order for  
6 Petitioner's removal under the VWP for remaining in the United States longer than  
7 authorized. Petitioner's petition for review from the removal order is currently pending  
8 before the United States Court of Appeals for the Ninth Circuit. Sebastiani v. Holder, No.  
9 10-70961 (9th Cir. pet. for review filed Mar. 26, 2010). On April 14, 2010, the Ninth Circuit  
10 continued its previously-granted stay of removal pending issuance of its mandate. Id.

11 In his Petition for Writ of Habeas Corpus, "Petitioner's claim for relief rests on the  
12 assertion that he is not subject to removal under provisions of the Visa Waiver Program  
13 because he did not execute a knowing and voluntary waiver of his right to contest removal  
14 before an immigration judge." (Doc. #1 at 2.) Petitioner argues that his removal order is  
15 invalid because ICE has not produced a Form I-94W waiver signed by him or by an  
16 authorized person on his behalf. Petitioner argues that his detention without bond is unlawful  
17 because he is not subject to a valid order of removal.

## 18 **II. Jurisdiction**

19 Under the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005),  
20 the district courts do not have habeas corpus jurisdiction to review an order of removal. Iasu  
21 v. Smith 511 F.3d 881, 886 (9th Cir. 2007). The REAL ID Act amended 8 U.S.C.  
22 § 1252(a)(5) to provide that "a petition for review filed with an appropriate court of appeals  
23 in accordance this section shall be the sole and exclusive means for judicial review of an  
24 order of removal entered or issued under any provision of this [Act]". 8 U.S.C.  
25 § 1252(a)(5). But the REAL ID Act only limits the district courts' ability to review an order  
26 of removal. It does not deprive the district courts of habeas corpus jurisdiction over an  
27 alien's claim that his ongoing detention is unlawful. Casas-Castrillon v. Dep't of Homeland  
28 Sec., 535 F.3d 942, 946 (9th Cir. 2008).

1           Although Petitioner challenges his detention, he does so only on the ground that his  
2 underlying order for removal is improper because he is not subject to removal under the  
3 VWP. Thus, to grant his habeas corpus petition, the Court would necessarily have to  
4 invalidate Petitioner’s order of removal. But under the REAL ID Act, the Ninth Circuit has  
5 exclusive jurisdiction to review Petitioner’s order of removal. 8 U.S.C. § 1252(a)(5).  
6 Because Petitioner’s detention claim is inextricably intertwined with his challenge to his  
7 removal order, this Court lacks habeas corpus jurisdiction over this action.

8           The REAL ID Act, however, includes a jurisdictional savings provision for challenges  
9 to removal that were mistakenly filed in the district courts. Subsection 106(c) of the REAL  
10 ID Act provides that if any § 2241 habeas corpus case “challenging a final administrative  
11 order of removal . . . **is pending in a district court on the date of enactment**, then the  
12 district court shall transfer the case . . . to the [appropriate] court of appeals.” REAL ID Act  
13 §106(c) (emphasis added). This action, however, cannot be transferred under § 106(c) of the  
14 REAL ID Act because it was not pending in this Court on the date of enactment. See Iasu,  
15 511 F.3d at 888-89. But § 106 of the REAL ID Act is not the only relevant jurisdictional  
16 savings provision.

17           When a claim is improperly brought in the district court, the court must consider  
18 whether the action should be transferred to the court of appeals pursuant to the general  
19 jurisdiction savings provision – 28 U.S.C. § 1631. Baeta v. Sonchik, 273 F.3d 1261, 1264-65  
20 (9th Cir. 2001). Section 1631 provides:

21           Whenever a civil action is filed in a court as defined in section 610 of this  
22 title or an appeal, including a petition for review of administrative action, is  
23 noticed for or filed with such a court and that court finds that there is a want  
24 of jurisdiction, the court shall, if it is in the interest of justice, transfer such  
25 action or appeal to any other such court in which the action or appeal could  
have been brought at the time it was filed or noticed, and the action or appeal  
shall proceed as if it had been filed in or noticed for the court to which it is  
transferred on the date upon which it was actually filed in or noticed for the  
court from which it is transferred.

26 28 U.S.C. § 1631. The transfer statute authorizes the Court to transfer this case to the United  
27 States Court of Appeals for the Ninth Circuit ““if: (1) [the court of appeals] would have been  
28 able to exercise jurisdiction on the date that [the petition was] filed in the district court; (2)

1 the district court lack[s] jurisdiction over the case[]; and (3) the transfer is in the interests of  
2 justice.” Baeta, 273 F.3d at 1264 (quoting Castro-Cortez v. INS, 239 F.3d 1037, 1046 (9th  
3 Cir. 2001), abrogated on other grounds, Fernandez-Vargas v. Gonzales, 548 U.S. 30 (2006)).

4 The Petition in this action was filed on April 23, 2010, which is more than 30 days  
5 after Petitioner’s order of removal was issued. Thus, the first prong of the transfer test is not  
6 satisfied because the Petition would not have been timely if it had been filed in the court of  
7 appeals on that date. See 8 U.S.C. § 1252(b)(1) (“petition for review must be filed not later  
8 than 30 days after the date of the final order of removal”). Moreover, Petitioner’s petition  
9 for review challenging his removal order is already pending before the Ninth Circuit.  
10 Sebastiani, No. 10-70961 (9th Cir.). Accordingly, the Court will not transfer this action to  
11 the Ninth Circuit. The action will be dismissed for lack of jurisdiction.

12 **III. Temporary Restraining Order — Preliminary Injunction**

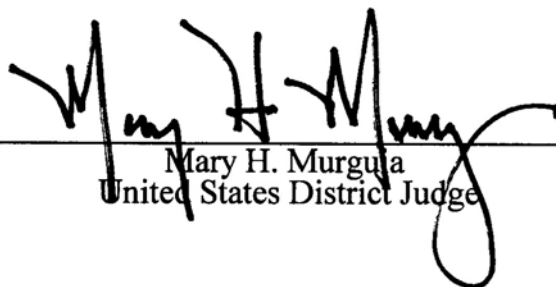
13 Because Petitioner has failed to demonstrate any chance of success on the merits of  
14 his Petition, his request for an order compelling his release will be denied. Arcamuzi v.  
15 Continental Air Lines, Inc., 819 F.2d 935, 937 (9th Cir. 1987) (if the applicant shows no  
16 chance of success on the merits, the injunction should not issue).

17 **IT IS ORDERED** that Petitioner’s Emergency Motion for a Temporary Restraining  
18 Order and/or Preliminary Injunctive Relief (Doc. #2) is denied.

19 **IT IS FURTHER ORDERED** that the Petition (Doc. #1) and this action are  
20 dismissed for lack of jurisdiction. The Clerk of Court shall enter a judgment accordingly.

21 DATED this 26<sup>th</sup> day of April, 2010.

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Mary H. Murgula  
United States District Judge