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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

EMMANUEL McSWEENEY,

Petitioner,

v.

KRISTI NOEM, Secretary of the Department of Homeland Security, PAMELA JO BONDI, Attorney General, TODD M. LYONS, Acting Director, Immigration and Customs Enforcement, JESUS ROCHA, Acting Field Office Director, San Diego Field Office, CHRISTOPHER LAROSE, Warden at Otay Mesa Detention Center,

Respondents.

CIVIL CASE NO.: 25-cv-02488-RBM-DEB

Supplemental Briefing in Support of Temporary Restraining Order

Introduction

On May 18, 2025, Mr. McSweeney was abruptly detained at his yearly check-in with ICE. The only explanation for his detention was that the country of Cuba had issued travel documents for him and that he would be given a prompt opportunity to contest the reasons for his revocation of supervision. The Notice of Revocation stated:

> ICE has determined that you can be expeditiously removed from the United States pursuant to the outstanding order of removal against you. On April 20, 2021, the Board of Immigration Appeals dismissed your case appeal, and you are subject to an administratively final order of removal. The Government of Cuba has issued a travel document for your removal.
>
> Based on the above, and pursuant to 8 C.F.R. § 241.4 / 8 C.F.R. § 241.13, you are to remain in ICE custody at this time. You will promptly be afforded an informal interview at which you will be given an opportunity to respond to the reasons for the revocation. You may submit any evidence or information you wish to be reviewed in support of your release. If you are not released after the informal interview, you will receive notification of a new review, which will occur within approximately three months of the date of this notice.

Exhibit D, March 18, 2025, Notice of Revocation.

More than six months following his detention, he has not had an opportunity to contest the reasons for his re-detention. What's more, he only recently learned that the reason "ICE re-detained [him was] to execute his removal order to Haiti or, in the alternative, the Bahamas." *Respondent's Return*, ECF 9-1 at 3, ¶5. According to ICE, "[s]ince Petitioner was re-detained, ERO has worked expeditiously to effectuate Petitioner's removal to Haiti." *Id.* at ¶ 7. That order of removal to Haiti, prior to the designated country of the Bahamas, is contrary to law.

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This Court should grant relief by immediately releasing Mr. McSweeney based on the due process violations when the Respondent's failed to comply with its own regulations of notice and opportunity to be heard, resulting in his prolonged detention. This Court should order that Mr. McSweeney may not be removed to Haiti in violation of consistent with 8 U.S.C. § 1231(b)(2). The release would also permit Mr. McSweeney to continue his habeas petition, contest ICE's efforts to remove him to Haiti prior to making efforts to remove him to the Bahamas, go back to his family in Florida, and litigate his motion to reopen based on changed circumstances in Haiti. This Court should grant temporary relief.

Procedural History

Because this case initially proceeded pro se and has rapidly moved following appointment of counsel, a brief procedural history of the case is appropriate.

On September 15, 2025, Mr. McSweeney filed a pro se petition for writ of Habeas Corpus and motion for appointment of counsel in the Eastern District of California. ECF No. 1. The filing was eventually transferred and filed to the Southern District of California on September 22. ECF No. 3. The Court denied the motion for appointment of counsel and ordered the Respondents to respond. ECF No. 24. On September 30, Respondents filed a return and advised the Court that Mr. McSweeney would be removed to Haiti within the week. ECF No. 9. The next day, the Court granted the renewed motion for appointment of counsel and appointed Federal Defenders of San Diego, Inc. ECF No. 10. Mr. McSweeney simultaneously filed a temporary restraining order requesting that the Court order the Respondents to release him because of ICE's failure to follow its own regulations (ECF No. 12 at 12-15) and enjoin ICE from removing him to Haiti based on ICE's violation of 8 U.S.C. § 1231(b)(2) and provide Mr. McSweeney to reopen his case in immigration court for purposes of seeking relief for removal to the alternative country of Haiti (ECF No. 12 at 8-12).

On October 3, 2025, at the hearing on the temporary restraining order, FDSDI raised arguments that Respondents had violated both its own regulations in detaining Mr. McSweeney in violation of his due process rights and that ICE had failed to comply with the mandated requirements of § 1231(b)(2) in its efforts to remove Mr. McSweeney from the country.

The same day, the Court issued an Order Setting Supplemental Briefing Schedule (ECF No. 17) and ordered Mr. McSweeney to explain: (1) whether this case is governed by 8 C.F.R. § 241.4 or § 241.13; (2) whether *Rauda v. Jennings*, 55 F.4th 773 (9th Cir. 2022) precludes jurisdiction of the due process claims; and (3) when in the removal proceedings the regulations require the designation of a country. The Court also ordered Mr. McSweeney to produce a copy of the Notice of Revocation that he received from ICE at the time he was re-detained. That notice is attached hereto as Exhibit D.

Mr. McSweeney now files this supplemental filing to address the Court's questions. He also simultaneously files an amended habeas petition to Mr. McSweeney's original pro se petition.

I. Respondent's failure to comply with Government Regulations -- 8 C.F.R. §§ 241.4 and 241.13 -- govern this case requiring immediate release.

The Court asks whether 8 C.F.R. § 241.4 or 8 C.F.R. § 241.13 governs Mr. McSweeney's case. 8 C.F.R. § 241.4(l) applies to re-detention generally. 8 C.F.R. § 241.13(i) applies to persons released after providing good reason to believe that they will not be removed in the reasonably foreseeable future. *See Rokhfirooz v. LaRose*, No. 25-CV-2053-RSH-VET, 2025 WL 2646165 at *2 (S.D. Cal. Sept. 15, 2025) (order from Judge Huie explaining this regulatory framework and granting a habeas petition for ICE's failure to follow these regulations as to an Iranian citizen). After review of the record, it is not clear to counsel which regulation Respondents placed Mr. McSweeney on an order of supervision. If the government never made a finding that it would not be able to remove Mr. McSweeney in the reasonably

foreseeable future, then the general § 241.4(l) applies. But if the government had made such a finding, then both would apply here. Regardless of the regulation, the outcome on the due process violation is the same.

Both regulations permit an official to "return [the person] to custody" because they "violate[d] any of the conditions of release." 8 C.F.R. § 241.13(i)(1); *see also* § 241.4(*l*)(1). They permit revocation of release *only if* the appropriate official (1) "determines that there is a significant likelihood that the alien may be removed in the reasonably foreseeable future," § 241.13(i)(2), and (2) makes that finding "on account of changed circumstances." *Id.*

But no matter the reason for re-detention, (3) the re-detained person is entitled to "an initial informal interview promptly," during which they "will be notified of the reasons for revocation." §§ 241.4(*l*)(1); 241.13(i)(3). The interviewer must (4) "afford[] the [person] an opportunity to respond to the reasons for revocation," allowing them to "submit any evidence or information" relevant to re-detention and evaluating "any contested facts." *Id.*

ICE is required to follow its own regulations. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954); *see Alcaraz v. INS*, 384 F.3d 1150, 1162 (9th Cir. 2004) ("The legal proposition that agencies may be required to abide by certain internal policies is well-established."). A court may review a re-detention decision for compliance with the regulations, and "where ICE fails to follow its own regulations in revoking release, the detention is unlawful and the petitioner's release must be ordered." *Rokhfirooz*, 2025 WL 2646165 at *4 (collecting cases).

ICE followed none of its four regulatory prerequisites to re-detain here. There was no record of a determination before his arrest that "there is a significant likelihood that [Petitioner] may be removed in the reasonably foreseeable future." *Id.* at *3 (quoting 8 C.F.R. § 241.13(i)(3)(1)). Absent any evidence for "why obtaining a travel document is more likely this time around[,] Respondents' intent

to eventually complete a travel document request for Petitioner does not constitute a changed circumstance." *Hoac v. Becerra*, No. 2:25-CV-01740-DC-JDP, 2025 WL 1993771, at *4 (E.D. Cal. July 16, 2025) (citing *Liu v. Carter*, No. 25-3036-JWL, 2025 WL 1696526, at *2 (D. Kan. June 17, 2025)).

The only record provided by ICE to Mr. McSweeney was that there were travel documents to remove Mr. McSweeney to Cuba. Exhibit D, Notice of revocation. ICE informed Mr. McSweeney that the reason for his detention was that Cuba had already issued travel documents for his removal. *Id.* It appears undisputed that the written notice to Mr. McSweeney was incorrect. Moreover, contrary to the regulations, Mr. McSweeney did not receive a prompt interview required by regulation or been afforded a meaningful opportunity to respond to the reasons for revocation. *McSweeney Decl*, Exhibit C, ¶ 6-11, at ECF 12 at 21. No one from ICE has ever invited him to contest his detention. *Id.*

Numerous courts have released re-detained immigrants after finding that ICE failed to comply with applicable regulations this summer and fall. *See, e.g.*, *Rokhfirooz*, 2025 WL 2646165; *Grigorian*, 2025 WL 2604573; *Delkash v. Noem*, 2025 WL 2683988; *Ceesay v. Kurzdorfer*, 781 F. Supp. 3d 137, 166 (W.D.N.Y. 2025); *You v. Nielsen*, 321 F. Supp. 3d 451, 463 (S.D.N.Y. 2018); *Rombot v. Souza*, 296 F. Supp. 3d 383, 387 (D. Mass. 2017); *Zhu v. Genalo*, No. 1:25-CV-06523 (JLR), 2025 WL 2452352, at *7–9 (S.D.N.Y. Aug. 26, 2025); *M.S.L. v. Bostock*, No. 6:25-CV-01204-AA, 2025 WL 2430267, at *10–12 (D. Or. Aug. 21, 2025); *Escalante v. Noem*, No. 9:25-CV-00182-MJT, 2025 WL 2491782, at *2–3 (E.D. Tex. July 18, 2025); *Hoac v. Becerra*, No. 2:25-cv-01740-DC-JDP, 2025 WL 1993771, at *4 (E.D. Cal. July 16, 2025); *Liu*, 2025 WL 1696526, at *2; *M.Q. v. United States*, 2025 WL 965810, at *3, *5 n.1 (S.D.N.Y. Mar. 31, 2025).

As noted recently by District Judge Simmons, "when the government grants an alien supervised release into the country, it creates a liberty interest intimately tied to freedom from imprisonment." *Tran v. Noem*, 25-cv-2334-JES-

MSB, ECF No. 15 (S.D. Cal. Sept. 19, 2025) (citing *Alegria Palma v. LaRose*, 25-cv-1942-BJC-MMP, ECF No. 14 (S.D. Cal. Aug. 11, 2025) (finding that "continued freedom after release on own recognizance" was a core liberty interest). "The government may not subsequently deprive an alien of that liberty interest without due process, meaning notice and an opportunity to be heard and, in DHS's own practices, a showing of some individualized circumstances relating to the alien that justify the deprivation." *Tran v. Noem*, 25-cv-2334-JES-MSB, ECF No. 15.

"[B]ecause officials did not properly revoke petitioner's release pursuant to the applicable regulations, that revocation has no effect, and [Mr. McSweeney] is entitled to his release (subject to the same Order of Supervision that governed his most recent release)." *Liu*, 2025 WL 1696526, at *3.

II. *Rauda* does not preclude this Court from having jurisdiction over Mr. McSweeney's due process claims.

At the hearing, the Respondents cited *Rauda v. Jennings*, 55 F.4th 773, 779 (9th Cir. 2022) for the proposition that this Court lacked jurisdiction to hear Mr. McSweeney's argument. That argument is unpersuasive.

In *Rauda*, after the BIA denied a stay of removal, the petitioner filed habeas corpus in the district court and requested a temporary restraining order enjoining the government from removing him until the BIA ruled on his motion to reopen. *Id.* at 776. The petitioner was in no way challenging his immigration detention or ICE's failure to comply with its own laws. The Ninth Circuit in *Rauda* held that an individual cannot invoke habeas jurisdiction to stay an order of removal until the BIA resolves his motion to reopen. *Id.* at 776-77. Relying on 8 U.S.C. § 1252(g), the Court reasoned that 8 U.S.C. § 1252(g) bars judicial review of claims challenging the government's execution of his removal order. *Id.* Specifically, the statute states that "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General

to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." 8 U.S.C. § 1252(g).

Rauda is inapplicable to this case for several reasons. To start, the Ninth Circuit recently emphasized that the Supreme Court has given a "narrow reading" to § 1252(g). *Ibarra-Perez v. United States*, __ F.4th __, 2025 WL 2461663, at *6 (9th Cir. Aug. 27, 2025) (citing *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 482-483 (1999) (hereinafter, "AADC"). The Supreme Court has cautioned against "expansive interpretations" of the "arising from" language in § 1252(g) that would cause "staggering results" like rendering prolonged detention claims unreviewable. *Jennings v. Rodriguez*, 583 U.S. 281, 294 (2018); *AADC*, 525 U.S. at 482-483. Instead, the Supreme Court characterized § 1252(g) as a "discretion-protecting provision." *AADC*, 525 U.S. at 487. The Court wrote, "Section 1252(g) was directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion." *Id.* at 485 n.9.

Here, Mr. McSweeney does not challenge ICE's discretion. Instead, he challenges the constitutionality of his detention and Respondent's failure to follow the law. Specifically, he challenges the violation of his due process rights when ICE detained him in violation of its own regulations and his ongoing prolonged detention in immigration custody. Section 1252(g) does not bar review of due process claims. Courts are mindful that "where possible, jurisdiction-limiting statutes should be interpreted to preserve the authority of the courts to consider constitutional claims." *Walters v. Reno*, 145 F.3d 1032, 1052 (9th Cir. 1998) (citation omitted). Any legislation that completely immunizes an agency's practices and procedures from due process challenges "would raise difficult constitutional issues." *Id.* (citing *Califano v. Sanders*, 430 U.S. 99, 108 (1977) (noting that "when constitutional questions are in issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the

'extraordinary' step of foreclosing jurisdiction unless Congress' intent to do so is manifested by 'clear and convincing' evidence").

Courts retain jurisdiction for challenges where a noncitizen is "contesting the lawfulness of restraint and securing release." *Alonso-Juarez v. Garland*, 80 F.4th 1039, 1052 n.5 (9th Cir. 2023) (quoting *Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 117 (2020)). Here, Mr. McSweeney not only seeks a stay of removal—he seeks "a remedy for unlawful executive detention." *Rauda v. Jennings*, 55 F.4th 773, 779 (9th Cir. 2022). This Court retains, at a minimum, jurisdiction to consider is ongoing detention.

Moreover, "§ 1252(g) does not prohibit challenges to unlawful practices merely because they are in some fashion connected to removal orders." *Ibarra-Perez*, 2025 WL 2461663, at *7. For instance, courts retain jurisdiction to consider due process claims that involve "general collateral challenges to unconstitutional practices and policies used by the agency." *Id.* (discussing *Walters*, 145 F.3d 1032) (quotations omitted). They also retain jurisdiction to consider arguments regarding a "right to meaningful notice" and any other claim asserting a "violation of [ICE's] mandatory duties." *Id.* at *7, *9.

Accordingly, "[t]hough 8 U.S.C § 1252(g), precludes this Court from exercising jurisdiction over the executive's decision to 'commence proceedings, adjudicate cases, or execute removal orders against any alien,' this Court has habeas jurisdiction over the issues raised here, namely the lawfulness of [Mr. McSweeney's] continued detention and the process required in relation to third country removal." *Y.T.D.*, 2025 WL 2675760, at *5. Many courts agree. *See, e.g.*, *Kong v. United States,* 62 F.4th 608, 617 (1st Cir. 2023) ("§ 1252(g) does not bar judicial review of Kong's challenge to the lawfulness of his detention," including ICE's "fail[ure] to abide by its own regulations"); *Cardoso v. Reno*, 216 F.3d 512, 516 (5th Cir. 2000) ("[S]ection 1252(g) does not bar courts from reviewing an alien detention order[.]"); *Parra v. Perryman*, 172 F.3d 954, 957

(7th Cir. 1999) (1252(g) did not apply to a "claim concern[ing] detention"); *J.R. v. Bostock*, No. 2:25-CV-01161-JNW, 2025 WL 1810210, at *3 (W.D. Wash. June 30, 2025) (1252(g) did not apply to claims that ICE was "failing to carry out non-discretionary statutory duties and provide due process"); *D.V.D. v. U.S. Dep't of Homeland Sec.*, 778 F. Supp. 3d 355, 377–78 (D. Mass. 2025) (§ 1252(g) did not bar review of "the purely legal question of whether the Constitution and relevant statutes require notice and an opportunity to be heard prior to removal of an alien to a third country").

III. Procedure for designation of country of removal.

The Court asks Mr. McSweeney to explain when in the removal proceedings does the regulation require designation of country of removal.

At an immigration hearing, "[a]fter determining that a noncitizen is removable, an IJ must assign a country of removal." *Hadera v. Gonzales*, 494 F.3d 1154, 1156 (9th Cir. 2007). The Supreme Court has made clear that the country designation for a removal must comply with the four-step "consecutive" order set forth in 8 U.S.C. § 1231(b)(2). *Jama v. ICE*, 543 U.S. 335, 341, (2005). At the "first step" or "step one," the IJ must give the noncitizen an opportunity to designate one country to which the noncitizen wants to be removed. *Id.* Specifically, the statute states that an alien "who has been ordered removed *may designate one country* to which the alien wants to be removed, [and] the Attorney General *shall* remove the alien to the country the alien so designates." 8 U.S.C. § 1231(b)(2)(A)(i)-(ii) (emphasis added).

To accomplish this first step, at the immigration hearing, the "immigration judge shall notify the respondent that if he or she is finally ordered removed, the country of removal will in the first instance be the country designated by the respondent, except as otherwise provided under [§ 1231(b)(2)], and shall afford him or her an opportunity then and there to make such a designation." 8 C.F.R. § 1240.10(f).

At the removal hearing, the IJ may designate "a country, or countries in the alternative, to which the alien's removal may be made pursuant to [8 U.S.C. § 1231(b)(2)] if the country of the alien's designation will not accept him or her into its territory, or fails to furnish timely notice of acceptance, or if the alien declines to designate a country." 8 C.F.R. § 1240.10(f)). The statute makes clear that the Attorney General cannot disregard the noncitizen's designation (step one) and proceed to an alternative country unless one of the enumerated exceptions is met. 8 U.S.C. § 1231(b)(2)(D) ("Alternative country").

Third, if no country satisfies the requirements of § 1231(b)(2)(D), the IJ must designate a country with which the noncitizen has a lesser connection, as specified in the statute. *See* 8 U.S.C. §§ 1231(b)(2)(E)(i)-(vi); *Jama*, 543 U.S. at 341; *Hadera*, 494 F.3d at 1157 (because there was no basis to designate a country under § 1231(b)(2)(D), IJ should have continued to the third step). Finally, if removal under the third step is "impracticable, inadvisable, or impossible," the IJ must designate "another country whose government will accept the [noncitizen] into that country." 8 U.S.C. § 1231(b)(2)(E)(vii); *Jama*, 543 U.S. at 341; *Himri*, 378 F.3d at 939 (holding that "at the time the government proposes a country of removal pursuant to § 1231(b)(2)(E)(vii), the government must be able to show that the proposed country will accept the [noncitizen]") (emphasis in original).

Furthermore, ICE may not remove a noncitizen to a country if the noncitizen's life or freedom would be threatened in that country because of the noncitizen's race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1231(b)(3). If the noncitizen expresses fear of persecution or harm upon return to any of the countries designated by the IJ, the IJ must inform the noncitizen that he or she may apply for asylum, withholding of removal, or relief under the Convention Against Torture ("CAT"). 8 C.F.R. § 1240.11(c)(1); *see also Jama*, 543 U.S. at 348 ("If [noncitizens] would face persecution or other mistreatment in the country designated under § 1231(b)(2),

they have a number of available remedies: asylum, § 1158(b)(1); withholding of removal, § 1231(b)(3)(A); relief under an international agreement prohibiting torture, *see* 8 CFR §§ 208.16(c)(4), 208.17(a) (2004) ....").

Conclusion

For these reasons along with those set out in the motion for temporary restraining order, the petition, and amended petition, Petitioner requests that this Court issue a temporary restraining order.

This Court should grant relief by immediately releasing Mr. McSweeney based on the due process violations when the Respondent's failed to comply with its own regulations of notice and opportunity to be heard, resulting in his prolonged detention. This Court should order that Mr. McSweeney may not be removed to Haiti in violation of consistent with 8 U.S.C. § 1231(b)(2). The release would also permit Mr. McSweeney to continue his habeas petition, contest ICE's efforts to remove him to Haiti prior to making efforts to remove him to the Bahamas, go back to his family in Florida, and litigate his motion to reopen based on changed circumstances in Haiti. This Court should grant temporary relief.

Respectfully submitted,

Dated: October 10, 2025

s/ Zandra L. Lopez
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