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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

Amendment and Supplement Habeas Petition under Federal Rule of Civil Procedure 15(a)(1), (c), (d)

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." 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. ICE chose this order of attempting Mr. McSweeney's removal despite the immigration judge's order stating that removal would be to the Bahamas, with Haiti as an alternative country. ECF No. 9-2 at 8.

Mr. McSweeney now files this amended and supplemental habeas petition. Federal Rule of Civil Procedure 15(a)(1) a "party may amend its pleading once as

a matter of course no later than 21 days after service of a responsive pleading." Under Rule 15(c), the claim in the amended petition "arose out of the conduct, transaction, or occurrence set out" in the earlier petition. Fed. R. Civ. P. 15(c)(1)(B). Here, the amended claims are all related to the underlying unlawful detention of Mr. McSweeney by ICE since May 18, 2025. Moreover, under Rule 15(d), the Court may "permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." It was not until after the filing of the petition, that Mr. McSweeney learned that the Respondents were planning to remove him to Haiti prior to making efforts to remove him to the designated country of the Bahamas.

CLAIMS FOR RELIEF

I. Claim 2: ICE failed to comply with its own regulations before re-detaining Mr. McSweeney, violating his rights under the Fifth Amendment and the Administrative Procedures Act.

In addition to *Zadvydas*'s protections, a series of regulations provide extra process for someone who, like Mr. McSweeney, is re-detained following a period of release. Two regulations establish the process due to someone who is re-detained in immigration custody following a period of release. 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).

These 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.* 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 was that there were travel documents to remove Mr. McSweeney to the third country of Cuba. ICE informed Mr. McSweeney that the reason for his detention was that Cuba had already issued travel documents for his removal.

Exhibit E. Nor did Mr. McSweeney receive the prompt interview required by regulation or been afforded a meaningful opportunity to respond to the reasons for revocation. Exhibit C, ¶ 7-11, found at ECF No. 12 at 18. 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.

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"[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. Count 3: ICE may not remove Mr. McSweeney to Haiti consistent with 8 U.S.C. § 1231(b)(2).

The government may not legally pursue its plan to remove Mr. McSweeney to Haiti, because 8 U.S.C. § 1231(b)(2) requires that ICE first seek removal to the Bahamas.

"Th[at] statute . . . provides four consecutive removal commands." *Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 341 (2005). First, "the Attorney General shall remove the alien to the country the alien so designates." 8 U.S.C. § 1231(b)(2)(A)(ii). Here, the designated country is the Bahamas. *See* ECF 9-2 at 8 (May 21, 2020 Order of Immigration Judge)

The Attorney General may "disregard [that] designation if" one of four criteria are met, but none are here. Mr. McSweeney did not "fail[] to designate a country promptly." 8 U.S.C. § 1231(b)(2)(C)(i). ICE also has not presented any evidence that the Bahamas has failed to respond to a request to remove Mr. McSweeney to that country. § 1231(b)(2)(C)(ii)-(iv).

This Court should therefore order that Mr. McSweeney cannot be removed to Haiti prior to the government making efforts for his removal to the Bahamas. *See Farah v. I.N.S.*, No. CIV. 02-4725DSDRLE, 2002 WL 31866481, at *4 (D. Minn. Dec. 20, 2002) (granting a habeas petition and prohibiting removal in violation of § 1231(b)(2)); *see also Jama*, 543 U.S. at 338 (reviewing a § 1231(b)(2) argument set forth in a habeas petition).

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III. Count 4: ICE may not remove Mr. McSweeney to a third country without adequate notice and an opportunity to be heard.

Following his filing of his original petition, Mr. McSweeney learned that the government is now attempting to remove people to third countries. The government may not legally pursue such a plan to remove Mr. McSweeney to a third country. Although Respondents have indicated in their final that they are not seeking third country removal, Mr. McSweeney makes this claim should Respondents change its mind in the future.

ICE's policies allow officers to do so without adequate notice and an opportunity to be heard. These policies violate the Fifth Amendment, the Convention Against Torture, and implementing regulations.

A. Legal background

U.S. law enshrines protections against dangerous and life-threatening removal decisions. By statute, the government is prohibited from removing an immigrant to any third country where they may be persecuted or tortured, a form of protection known as withholding of removal. *See* 8 U.S.C. § 1231(b)(3)(A). The government "may not remove [a noncitizen] to a country if the Attorney General decides that 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." *Id.*; *see also* 8 C.F.R. §§ 208.16, 1208.16. Withholding of removal is a mandatory protection.

Similarly, Congress codified protections enshrined in the CAT prohibiting the government from removing a person to a country where they would be tortured. *See* FARRA 2681-822 (codified as 8 U.S.C. § 1231 note) ("It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the

person is physically present in the United States."); 28 C.F.R. § 200.1; *id.* §§ 208.16-208.18, 1208.16-1208.18. CAT protection is also mandatory.

To comport with the requirements of due process, the government must provide notice of the third country removal and an opportunity to respond. Due process requires "written notice of the country being designated" and "the statutory basis for the designation, i.e., the applicable subsection of § 1231(b)(2)." *Aden v. Nielsen*, 409 F. Supp. 3d 998, 1019 (W.D. Wash. 2019); *accord D.V.D. v. U.S. Dep't of Homeland Sec.*, No. 25-cv-10676-BEM, 2025 WL 1453640, at *1 (D. Mass. May 21, 2025); *Andriasian v. INS*, 180 F.3d 1033, 1041 (9th Cir. 1999).

The government must also "ask the noncitizen whether he or she fears persecution or harm upon removal to the designated country and memorialize in writing the noncitizen's response. This requirement ensures DHS will obtain the necessary information from the noncitizen to comply with section 1231(b)(3) and avoids [a dispute about what the officer and noncitizen said]." *Aden*, 409 F. Supp. 3d at 1019. "Failing to notify individuals who are subject to deportation that they have the right to apply for asylum in the United States and for withholding of deportation to the country to which they will be deported violates both INS regulations and the constitutional right to due process." *Andriasian*, 180 F.3d at 1041.

If the noncitizen claims fear, measures must be taken to ensure that the noncitizen can seek asylum, withholding, and relief under CAT before an immigration judge in reopened removal proceedings. The amount and type of notice must be "sufficient" to ensure that "given [a noncitizen's] capacities and circumstances, he would have a reasonable opportunity to raise and pursue his claim for withholding of deportation." *Aden*, 409 F. Supp. 3d at 1009 (citing *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) and *Kossov v. I.N.S.*, 132 F.3d 405, 408 (7th Cir. 1998)); *cf. D.V.D.*, 2025 WL 1453640, at *1 (requiring the government to move to reopen the noncitizen's immigration proceedings if the

individual demonstrates "reasonable fear" and to provide "a meaningful opportunity, and a minimum of fifteen days, for the non-citizen to seek reopening of their immigration proceedings" if the noncitizen is found to not have demonstrated "reasonable fear"); *Aden*, 409 F. Supp. 3d at 1019 (requiring notice and time for a respondent to file a motion to reopen and seek relief).

"[L]ast minute" notice of the country of removal will not suffice, *Andriasian*, 180 F.3d at 1041; *accord Najjar v. Lunch*, 630 Fed. App'x 724 (9th Cir. 2016), and for good reason: To have a meaningful opportunity to apply for fear-based protection from removal, immigrants must have time to prepare and present relevant arguments and evidence. Merely telling a person where they may be sent, without giving them a chance to look into country conditions, does not give them a meaningful chance to determine whether and why they have a credible fear. !

B. The June 6, 2025 memo's removal policies violate the Fifth Amendment, 8 U.S.C. § 1231, the Conviction Against Torture, and Implementing Regulations.

The policies in the June 6, 2025 memo do not adhere to these requirements. First, under the policy, ICE need not give immigrants *any* notice or *any* opportunity to be heard before removing them to a country that—in the State Department's estimation—has provided "credible" "assurances" against persecution and torture. By depriving immigrants of any chance to challenge the State Department's view, this policy violates "[t]he essence of due process," "the requirement that a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it." *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (cleaned up).

Second, even when the government has obtained no credible assurances against persecution and torture, the government can still remove the person with between 6 and 24 hours' notice, depending on the circumstances. Practically speaking, there is not nearly enough time for a detained person to assess their risk in the third country and martial evidence to support any credible fear—let alone a chance to file a motion to reopen with an IJ. An immigrant may know nothing about

a third country, like Eswatini or South Sudan, when they are scheduled for removal there. Yet if given the opportunity to investigate conditions, immigrants would find credible reasons to fear persecution or torture—like patterns of keeping deportees indefinitely and without charge in solitary confinement or extreme instability raising a high likelihood of death—in many of the third countries that have agreed to removal thus far. Due process requires an adequate chance to identify and raise these threats to health and life. This Court must prohibit the government from removing Mr. McSweeney without these due process safeguards.

Conclusion

For those reasons, this Court should grant this motion to amend and supplement.

Respectfully submitted,

Dated: October 10, 2025

s/ Zandra L. Lopez
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