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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

EMMANUEL I. McSWEENEY,

Petitioner,

v.

WARDEN OF THE OTAY MESA DETENTION FACILITY, et al.,

Respondents.

Case No.: 25-cv-02488-RBM-DEB

RESPONDENTS' SUPPLEMENTAL BRIEF

Respondents submit this supplemental brief as ordered by the Court. [ECF No. 17.] Aside from responding to the issues raised in the Court's Order, Respondents will address whether ICE attempted to remove Petitioner to the Bahamas and issues raised by the Amended Petition filed on October 10, 2025. [ECF 19]. At bottom line, as discussed below, the Embassy Consular Annex of the Commonwealth of the Bahamas informed ICE that the Bahamas would not repatriate Petitioner. Based thereon, ICE is able and prepared to immediately execute the Immigration Judge's valid order that Petitioner be removed to Haiti. Neither Petitioner's initial claims, nor those raised by the Amended Petition, bar such removal at this point. The Court should deny the Petition.

I.

PETITIONER'S CLAIMS AND REQUESTED RELIEF ARE BARRED BY 8 U.S.C. § 1252 AND *RAUDA V. JENNINGS*

Petitioner bears the burden of establishing that this Court has subject matter jurisdiction over his claims. *See Ass'n of Am. Med. Coll. v. United States*, 217 F.3d 770, 778-79 (9th Cir. 2000); *Finley v. United States*, 490 U.S. 545, 547-48 (1989). But he cannot do so because the Court lacks jurisdiction to review a decision to commence or adjudicate removal proceedings or execute removal orders. *See* 8 U.S.C. § 1252(g) ("[N]o 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.") (emphasis added); *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) ("There was good reason for Congress to focus special attention upon, and make special provision for, judicial review of the Attorney General's discrete acts of "commenc[ing] proceedings, adjudicat[ing] cases, [and] execut[ing] removal orders"—which represent the initiation or prosecution of various stages in the deportation process."). In other words, § 1252(g) removes district court jurisdiction over "three discrete actions that the Attorney may take: [his] 'decision or action' to 'commence proceedings, adjudicate cases, or execute removal orders.'" *Reno*, 525 U.S. at 482 (emphasis removed).

Petitioner argues that his removal should be stayed, and that he should be released, pending his future efforts to reopen his removal proceedings. But, the Ninth Circuit has held that § 1252(g) divests district courts of jurisdiction to stay removal for the adjudication of pending motions to reopen removal proceedings. *See Rauda v. Jennings*, 55 4th 772, 777 (9th Cir. 2022); *see also Tazu v. Barr*, 975 F.3d 292, 300 (3d Cir. 2020) (holding that § 1252(g) stripped the court of jurisdiction to stay petitioner's removal while he appealed the denial of his motion to reopen); *Hamama v. Adducci*, 912 F.3d 869, 874 (6th Cir. 2018), cert. denied, 141 S. Ct. 188 (2020) (holding that § 1252(g) divested the district court of

jurisdiction to stay the petitioners' removal while they sought to reopen their removal proceedings based on changed country conditions). Moreover, removal does not prevent petitioner from filing a motion to reopen. This is so because "the statutory right to file a motion to reopen and a motion to reconsider is not limited by whether the individual has departed the United States." *Toor v. Lynch*, 789 F.3d 1055, 1057 (9th Cir. 2015).

Because *Rauda* controls and dictates that § 1252(g) deprives courts of jurisdiction over claims seeking a stay of removal while a motion to reopen is pending—assuming Petitioner files one—the Court lacks jurisdiction over, and must dismiss, the petition and request for interim relief. *See also Ibarra-Perez v. United States*, --- F.4th ---, 2025 WL 2461663, at *8 (9th Cir. Aug. 7, 2025) (noting with approval *Rauda*'s holding that § 1252(g) bars challenges to ICE's discretionary authority about "when" and "whether" to remove a noncitizen subject to a final, executable order of removal); *Ponce v. Garland*, No. EDCV221751JGBPVC, 2022 WL 14318031, at *3 (C.D. Cal. Oct. 24, 2022) ("Petitioner's action is indistinguishable from that in *Rauda* and demands the same outcome. Pursuant to § 1252(g), this Court does not have jurisdiction to grant the relief that Petitioner seeks."); *Eliazar G.C. v. Wofford*, No. 1:24-CV-01032-EPG-HC, 2025 WL 1124688, at *3 (E.D. Cal. Apr. 16, 2025) ("[T]he Court finds that § 1252(g) is applicable and this Court lacks jurisdiction to consider Petitioner's request to stay removal.").

Here, this Court lacks subject matter jurisdiction under 8 U.S.C. § 1252 because Petitioner's request for relief indisputably "arise[s] from" an "action" or a "proceeding" brought in connection with his removal. *See* 8 U.S.C. §§ 1252(a)(5), (b)(9), and (g). Moreover, under 8 U.S.C. § 1252(b)(9), "[j]udicial review of all questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in juridical review of a final order under this section." Further, judicial review of a final order is available only through "a petition for review filed with an appropriate court of appeals." 8 U.S.C. § 1252(a)(5). The Supreme Court has made clear that § 1252(b)(9) is "the unmistakable 'zipper' clause," channeling

"judicial review of all" "decisions and actions leading up to or consequent upon final orders of deportation," including "non-final order[s]," into proceedings before a court of appeals. *Reno*, 525 U.S. at 483, 485; *see See J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016) (noting § 1252(b)(9) is "breathtaking in scope and vise-like in grip and therefore swallows up virtually all claims that are tied to removal proceedings").

"Taken together, § 1252(a)(5) and § 1252(b)(9) mean that any issue—whether legal or factual—arising from any removal-related activity can be reviewed only through the [petition for review] PFR process." *J.E.F.M.*, 837 F.3d at 1031 ("[W]hile these sections limit how immigrants can challenge their removal proceedings, they are not jurisdiction-stripping statutes that, by their terms, foreclose all judicial review of agency actions. Instead, the provisions channel judicial review over final orders of removal to the courts of appeal.") (emphasis in original). Finally, aside from the Court's lack of jurisdiction, the Petition should be dismissed because Petitioner is not entitled to adjudication of any future motion to reopen before removal.

Even if the Court had jurisdiction to stay Petitioner's removal, Respondents note that Petitioner had the opportunity to seek relief from removal to Haiti in his removal proceedings before the immigration judge entered the final order of removal. *See* 8 C.F.R. § 1241.10(f) (noting that the immigration judge shall identify for the record the country of removal and alternative countries); EOIR, Immigration Court Practice Manual, Part (i), https://www.justice.gov/eoir/reference-materials/ic/chapter-4/15# (noting that the noncitizen and DHS should be prepared to designate or decline to designate a country of removal at the master calendar hearing). As the Ninth Circuit has instructed, district courts should reject last-minute fear claims made to obtain a stay of removal.

> If a court could inject itself into the agency's process and force (another) stay because a removable alien—whose petition for review had already been denied by our court—newly represented to us that he would be severely injured or die when removed, all similarly situated petitioners would be incentivized to demand a stay and make similar claims to keep themselves in the country while the BIA considers their

> motions to reopen. And without records from the agency to review, we would be presented with just the petitioners' untested claims of possible future harm. That this would become the new norm, and that courts would essentially be granting automatic stays of removal pending the BIA's consideration of motions to reopen, seems foreseeable enough.

Rauda, 55 F.4th at 781.

In his Amended Petition and Supplemental Brief, Petitioner sets out the process for designation of country of removal and contends that the IJ could not, lawfully, have designated Haiti as an alternative country for removal. But 8 C.F.R. § 1240.12(d) provides that the IJ "shall identify a country, *or countries in the alternative*, to which the alien's removal may in the first instance be made pursuant to the provisions of [8 U.S.C. § 1231(b)]." (emphasis added). Further, such designation by the Immigration Judge "is subject to judicial review through the petition-for-review process." *Ibarra-Perez*, 2025 WL 2461663, at *5. This habeas petition is not the proper mechanism for such review.

Finally, the Ninth Circuit in *Rauda* rejected the Petitioner's argument that § 1252(g)'s limit on judicial review violated the Due Process Clause by denying review of his claims. Instead, the court found that § 1252(g) only prevented Petitioner from filing a habeas petition challenging the Attorney General's discretion to execute a valid order of removal while his motion to reopen remained pending. *Id.* at 780. On the issue of timing, the Attorney General's discretion applies not only to whether the removal order should be executed, but also when to do so. *Poghosyan v. U.S. Dep't of Homeland Security*, No. 2:25-cv-03091-SB-ADS, 2025 WL 1287771, at *3 (C.D. Cal. May 1, 2025).

II.

THE BAHAMAS REJECTED PETITIONER'S REPATRIATION

During the October 3, 2025 hearing, Petitioner argued that the declaration submitted by DO Jason Cole did not establish any attempt by ICE to remove him to the Bahamas. But, on September 23, 2025, the Bahamian Consulate provided ICE Enforcement and Removal Operations (ERO) with email correspondence confirming that the Petitioner is not a citizen

of the Bahamas. (Cole Decl., ¶ 10.) Moreover, ICE did request the Bahamas to accept Petitioner upon removal from the United States. But the Bahamian government refused to repatriate Petitioner. They would not take him. And Petitioner has submitted nothing to show the contrary. As set forth in an email from the Embassy Consular Annex of the Commonwealth of the Bahamas sent to DO Cole:

> Good afternoon Officer Cole,
>
> The Bahamas Embassy Consular Annex wishes to advise that it has been determined that Mr. Emmanuel Ishmael McSweeney is not a citizen of the Commonwealth of The Bahamas.
> Therefore, **he should not be repatriated to The Bahamas**.
>
> This confirmation is provided for your official records, and the Consular Annex trusts that this determination will guide any future action taken in respect of Mr. McSweeney's matter.
>
> Best regards,
>
> Embassy Consular Annex of the Commonwealth of The Bahamas
> 1200 17th Street NW, Suite 200
> Washington, D.C. 20036
> Tel: 202-734-6578
> Fax: 202-595-8251
> Facebook:
> https://www.facebook.com/embassyconsularannex
> Instagram: bahamasembassyconsularannex

(September 23, 2025 Email to DO Cole from Embassy Consular Annex of the Bahamas, Respondents' Supplemental Table of Exhibits, Exh. 1 (emphasis added).)

Petitioner indicates he wants an opportunity to establish his citizenship with the Bahamas. But Petitioner's desire to establish that he is a citizen of the Bahamas does not in any way invalidate the IJ's final executable order of removal to Haiti. Further, while Petitioner has filed documents under oath asserting Haitian citizenship to obtain TPS benefits, Petitioner still has the ability to change his citizenship status with the Bahamas after removal.

III.

ICE COMPLIED WITH ITS REGULATIONS FOR RE-DETAINING PETITIONER

Petitioner claims that his detention is unlawful because the agency failed to comply with its regulations for re-detaining him. But there is no basis for claiming that "before" revoking an individual's release from immigration custody, ICE must provide written notice of the reasons for the revocation, pursuant to 8 C.F.R. § 241.4(l). The regulation clearly provides:

> *Upon revocation*, the alien will be notified of the reasons for revocation of his or her release or parole. The alien will be afforded an initial informal interview promptly *after* his or her return to Service custody to afford the alien an opportunity to respond to the reasons for revocation stated in the notification.

Id. (emphasis added).

Here, ICE provided Petitioner with written notice of his revocation of release on March 18, 2025, the day of his arrest. (See Petitioner's Ex. D, ECF No. 18-1, p. 2.) In it, ICE set forth the reasons for Petitioner's re-detention as follows:

> ICE has determined that *you can be expeditiously removed* from the United States pursuant to an 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 administrative final order of removal.

Id. (emphasis added).[1]

The Notice of Revocation further provides that Cuba has issued a travel document for Petitioner's removal. But given that the IJ ordered Petitioner removed to the Bahamas,

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[1] In its Order Setting Supplemental Briefing Schedule (ECF No. 17), the Court directed the parties to address whether 8 C.F.R. § 241.4 or 8 C.F.R. § 241.13 governs this case. As indicated in the justification for re-detention provided to Petitioner in the Notice of Revocation of Release (availability to be expeditiously removed), 8 C.F.R. § 241.4 is the applicable provision.

or in the alternative Haiti, this was an obvious typographical mistake. Petitioner has never been ordered removed to Cuba by an IJ. Nor does Cuba appear as a destination for Petitioner's removal in any other records counsel for Respondents have reviewed, or which have been produced by Petitioner.

Even assuming the agency's compliance with the regulations fell short, Petitioner has not established substantial prejudice. *See Carnation Co. v. Sec'y of Lab.*, 641 F.2d 801, 804 n.4 (9th Cir. 1981) (adopting prejudice standard to determine whether regulatory violation violated due process); *Cmty. Legal Servs. in E. Palo Alto v. United States Dep't of Health & Hum. Servs.*, 780 F. Supp. 3d 897, 921 (N.D. Cal. 2025) (the Accardi doctrine, which generally requires federal agencies to comply with their own regulations, requires plaintiffs to "show both that (1) the Government violated its own regulations, and (2) Plaintiffs suffer substantial prejudice as a result of that violation.") (citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268) (1954); *Al Otro Lado, Inc. v. Mayorkas*, No. 23 cv 1367 AGS BLM, 2024 WL 4370577, at *8–9 (S.D. Cal. Sept. 30, 2024)); *see also Louangmilith v. Noem*, No. 25cv2502-JES(MSB), 2025 WL 2881578 (S.D. Cal. Oct. 9, 2025) (finding no due process violation from ICE's failure to comply with its regulations requiring notice upon re-detention because there was a significant likelihood that Petitioner would be removed in the imminent future).

At the time of his re-detention, Petitioner knew he was subject to a final order of removal to Haiti as the alternative country to the Bahamas. Petitioner's arguments that he did not have notice of his potential removal to Haiti are meritless. He had years of notice.

Similarly, Petitioner cannot show prejudice because ICE seeks to remove him to one of the countries designated by the IJ. Under the circumstances, the alleged violation of agency regulations does not warrant release here. *See, e.g., Carnation Co.*, 641 F.2d at 804 n.4 ("[V]iolations of procedural regulations should be upheld if there is no significant possibility that the violation affected the ultimate outcome of the agency's action." (citation omitted)); *United States v. Hernandez-Rojas*, 617 F.2d 533, 535 (9th Cir. 1980) (INS'

failure to follow regulations requiring that an arrested alien be advised of his right to speak to his consul was not prejudicial and thus not a ground for challenging the conviction); *United States v. Barraza-Leon*, 575 F.2d 218, 221–22 (9th Cir. 1978) (holding that even assuming the judge had violated the rule by failing to inquire into the alien's background, any error was harmless because there was no showing that the petitioner was qualified for relief from deportation).

Petitioner also claims he was not afforded an interview under 8 C.F.R. 241.4(i)(3). But Petitioner provided ICE with information related to ICE's detention decision. The Decision to Continue Detention indicates that the information was provided on February 25, 2025. The Court has ordered Respondents to provide any additional documentation confirming that the information was provided on that date. Respondents have been unable to locate any. But the Notice of Revocation and Release informed Petitioner that, "You may submit any evidence or information you wish to be reviewed in support of your release." [Notice of Revocation and Release, ECF No. 18-1.] Therefore, Petitioner was advised of his right to do so.

As there is a significant likelihood that Petitioner will be removed in the imminent future, "the unique factual circumstances here as a practical matter obviates the primary [due process] relief that Petitioner seeks [related to his due process] claim." S*ee Louangmilith v. Noem*, No. 25cv2502-JES(MSB), 2025 WL 2881578 (S.D. Cal. Oct. 9, 2025) (finding no due process violation from ICE's failure to comply with its regulations requiring notice upon re-detention because there was a significant likelihood that Petitioner would be removed in the imminent future).

IV.

CONCLUSION

For the foregoing reasons, and those set forth in Respondents' prior briefing and exhibits, the Court is requested to deny the motion for a temporary restraining order and dismiss the Petition.

DATED: October 15, 2025

Respectfully submitted,

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