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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

YAMRAJ KHADKA,

Petitioner,

vs.

MARKWAYNE MULLIN, Secretary, Department of Homeland Security; DAVID VENTURELLA, in his official capacity as Acting Director of U.S. Immigration and Customs Enforcement; NANCY GONZALEZ, Acting Director, Bakersfield, ICE Field Office; and CHRISTOPHER CHESTNUT, Warden, California City Correctional Facility; TODD BLANCHE, Acting Attorney General of the United States; Executive Office of Immigration Review,

Respondent(s)

Case No.: 1:26-CV-05225-JLT-CDB

PETITIONER'S TRAVERSE TO RESPONDENTS' RESPONSE TO ORDER TO SHOW CAUSE

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I. INTRODUCTION

Return argues only that the Court lacks jurisdiction to consider Petitioner's third-country due process claim (Count Two) and that removal is "reasonably foreseeable" as to Count One. Dkt. 8 at 2–3. Neither argument withstands scrutiny, and neither answers the question this case actually presents: whether Respondents may remove Petitioner to a country never designated in any removal proceeding, without notice, without an opportunity to be heard, and without ever reopening the immigration court proceedings that adjudicated his case. They may not.

Respondents' Motion to Modify Judgment, filed the day before their Return, confirms the urgency. A removal flight is scheduled for the last week of July. Karan Decl. ¶ 7. Petitioner respectfully requests that the Court deny Respondents' Response to the Order to Show Cause, grant the Petition, and either order Petitioner's release under 8 U.S.C. § 1231(a)(6) or, at minimum, enjoin his removal to CAR unless and until Respondents reopen his removal proceedings and afford him the process due before an immigration judge.

II. STATEMENT OF THE CASE

On July 7, 2026, the Court denied Petitioner's request for a temporary restraining order as untimely under Local Rule 231(b), referred the matter to the assigned magistrate judge for a determination on the merits, and set a briefing schedule requiring Respondents to file a responsive pleading within twenty-one days and Petitioner to file a traverse no later than seven days after Respondents' filing. Dkt. 4. In the same order, the Court separately exercised its "express authority under the All Writs Act to issue such temporary injunctions as may be necessary to protect its own jurisdiction," and ordered that, unless and until it directed otherwise, Respondents "shall not remove Petitioner from the United States nor transfer Petitioner out of this District" pending resolution of the Petition. Dkt. 4 (quoting *FTC v. Dean Foods Co.*, 384 U.S. 597, 604 (1966)).

Respondents' Return does not dispute the material facts alleged in the Petition. It confirms that

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acceptance of Petitioner only *after the Petition was filed*, and have scheduled his removal for the last week of July 2026. Karan Decl. ¶¶ 5–7. Nothing in the Return, the Karan Declaration, or the Department of State letter at Dkt. 7-2 states that Petitioner was ever told CAR had been identified as a possible destination, or that he was ever asked whether he fears return there. Khadka Decl. ¶¶ 2–8.

III. ARGUMENT

A. Respondents' Return Does Not Rebut Petitioner's Due Process Claim Regarding Removal to CAR Because It Does Not Address That Claim on the Merits.

1. Governing Law

"It is well established that the Fifth Amendment entitles [noncitizens] to due process of law in deportation proceedings." *Demore v. Kim*, 538 U.S. 510, 523 (2003). "Failing to notify individuals who are subject to deportation that they have the right to apply for asylum ... 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 v. I.N.S.*, 180 F.3d 1033, 1041 (9th Cir. 1999); *accord Ibarra-Perez v. United States*, 154 F.4th 989, 995 (9th Cir. 2025) (reaffirming *Andriasian*). Courts evaluate what process is due under the three-factor test of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976): the private interest at stake, the risk of erroneous deprivation and the value of additional safeguards, and the government's interest, including administrative burden. Each factor favors Petitioner for the reasons set out in Petitioner's Opposition to the Motion to Modify Judgment, incorporated here by reference.

2. The Record — Including Respondents' Own Evidence — Confirms No Notice or Opportunity Was Given.

The Karan Declaration describes CAR's acceptance of Petitioner and a scheduled removal flight but never states that Petitioner received notice of CAR's designation or an opportunity to raise a fear-

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3. The Process Due Is a Reopened Proceeding Before an Immigration Judge — Not an Ad Hoc Agency Screening Respondents Never Even Initiated.

The regulations confirm that it is an immigration judge, not DHS, who identifies the country of removal in the first instance: "When a respondent is ordered removed from the United States, the immigration judge shall identify a country, or countries in the alternative, to which the alien's removal may in the first instance be made, pursuant to [8 U.S.C. § 1231(b)(2)]." 8 C.F.R. § 1240.12(d). Only where DHS is "unable to remove the alien to the specified or alternative country or countries" does "the order of the immigration judge" cease to "limit [DHS's authority] to remove the alien to any other country as permitted by [8 U.S.C. § 1231(b)]." *Id.* Consistent with that framework, courts have required that any fear-based objection to a newly identified third country be resolved in reopened removal proceedings before an immigration judge — not through an internal agency screening conducted by the same executive branch component seeking to effect removal. *See Nguyen v. Scott*, 796 F. Supp. 3d 703, 739 (W.D. Wash. 2025) (enjoining removal "to a [third] country ... without notice and a meaningful opportunity to be heard in reopened removal proceedings with a hearing before an immigration judge"); *D.V.D. v. U.S. Dep't of Homeland Sec.*, No. 25-10676-BEM, 2025 WL 1453640, at *1 (D. Mass. May 21, 2025) (requiring DHS to move to reopen proceedings where the noncitizen demonstrates a reasonable fear, and to provide a meaningful opportunity to seek reopening); *Aden v. Nielsen*, 409 F. Supp. 3d 998, 1019 (W.D. Wash. 2019) (due process requires written notice of the country designated, the statutory basis for the designation, and time to file a motion to reopen).

Respondents' own policy confirms as much. The Karan Declaration states that ICE will proceed under the "March 30th, 2025, memorandum Guidance Regarding Third Country Removals." Karan Decl. ¶ 8. Courts describing that same DHS policy have explained that where a noncitizen demonstrates reasonable fear of the newly identified country, the policy itself directs ICE to "move to reopen removal [withholding of removal] and

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country-level diplomatic assurance obtained from the CAR government, Dkt. 7-2, as a substitute for the individualized process *Andriasian*, *Ibarra-Perez*, *Nguyen*, *D.V.D.*, and *Aden* all require. It is not. *See Vishal v. Chestnut*, 811 F. Supp. 3d 1179, 1187–88 (E.D. Cal. 2025) (finding the policy "violates due process and is contrary to Ninth Circuit precedent"); *A.A.M.*, 815 F. Supp. 3d at 1137–38 (same, applying *Mathews*).

The point is even stronger here than in the courts' prior decisions. In *A.A.M.*, the petitioner had already received a USCIS screening interview regarding the proposed third country, and the question was whether due process required escalation to an immigration judge after USCIS found no credible fear. 815 F. Supp. 3d at 1136–37. The court held that it did. *Id.* at 1137–38. Petitioner here has received nothing — no notice, no screening interview, no opportunity of any kind. If a noncitizen who has already been screened by USCIS is entitled to have an immigration judge review that determination before third-country removal, a fortiori Petitioner, who has received no process at any level, is entitled to no less.

4. Respondents Have Not Shown CAR Is a Permissible Removal Destination Under 8 U.S.C. § 1231(b)(2).

Section 1231(b)(2) establishes a mandatory hierarchy: a country the noncitizen designates; failing that, the country of citizenship; failing that, an enumerated list tied to the noncitizen's travel and birth history; and only if removal to each is "impracticable, inadvisable, or impossible" may DHS resort to "another country whose government will accept" the noncitizen. 8 U.S.C. § 1231(b)(2)(A)–(E); 8 C.F.R. § 1240.12(d) (the immigration judge, not DHS, identifies the country of removal in the first instance). Respondents correctly note that withholding of removal to Nepal does not itself bar removal to a different country; because withholding is "'country specific'" relief, "nothing prevents DHS 'from removing [the] alien to a third country other than the country to which removal has been withheld or

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Return does not address this gap.

B. Respondents' Jurisdictional and Exhaustion Arguments Do Not Bar Adjudication of Petitioner's Third-Country Claim.

Respondents argue that *Rauda v. Jennings*, 55 F.4th 773 (9th Cir. 2022), and "prudential exhaustion" under *Laing v. Ashcroft*, 370 F.3d 994 (9th Cir. 2004), foreclose the Petition. Dkt. 8 at 2–3. Neither applies to Count Two. Rauda held that 8 U.S.C. § 1252(g) strips courts of jurisdiction over claims "arising from the decision or action by the Attorney General to ... execute removal orders." 55 F.4th at 777. But the claim in *Rauda* was a challenge to the timing of executing an already-final, already-adjudicated removal order to El Salvador — the country *actually designated* in that petitioner's removal order — while his motion to reopen based on new evidence concerning that same country was pending before the BIA. *Id.* at 775–76. Petitioner's due process claim is not that. He does not challenge the execution of his December 31, 2025 order, which designated Nepal; he does not seek to enjoin his removal to Nepal, and Respondents represent they do not intend to remove him there. The claim instead challenges Respondents' unadjudicated decision to remove him to a country that order never addressed, without any of the process the INA and the Fifth Amendment require before that can happen — a decision no order has yet been entered to "execute." As for exhaustion, Respondents do not identify what administrative remedy Petitioner failed to pursue. *Laing* itself recognizes that § 2241 "does not specifically require petitioners to exhaust direct appeals before filing petitions for habeas corpus," 370 F.3d at 997, and that prudential exhaustion may be waived as futile where, as here, the government's own position forecloses any administrative remedy to exhaust. *Id.* at 997–98. Courts adjudicating identical third-country due process claims have not required exhaustion of a process the government never offered. *See Nguyen*, 796 F. Supp. 3d at 738–39; D.V.D., 2025 WL 1453640, at *1; *Aden*, 409 F. Supp. 3d at 1019.

C. Respondents' Boilerplate Return Fails to Rebut Petitioner's Entitlement to

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533 U.S. 678 (2001): once a noncitizen shows no significant likelihood of removal in the reasonably foreseeable future, the burden shifts to the government to rebut that showing. *Id.* at 701; Pet. ¶¶ 48–52. At the time the Petition was filed, Petitioner had been detained more than six months post-order *with no removal effort of any kind* and no third country identified — squarely satisfying that burden. Pet. ¶¶ 4–5, 39.

Respondents' subsequent arrangement with CAR, disclosed only in their post-Petition Motion to Modify, does not defeat that showing. A removal that itself violates the Fifth Amendment and the INA's country-designation hierarchy is not "reasonably foreseeable" in any sense that satisfies *Zadvydas*; a removal Respondents are not presently entitled to execute is not evidence that removal will occur. Until Respondents reopen Petitioner's removal proceedings and lawfully designate a country of removal — whether CAR or another — Petitioner's *Zadvydas* showing stands unrebutted.

Johnson v. Guzman Chavez and *Johnson v. Arteaga-Martinez,* on which Respondents rely, do not hold otherwise. Both address a narrower question: whether § 1231(a)(6) requires periodic bond hearings before an immigration judge with the government bearing the burden of proof. *Arteaga-Martinez*, 596 U.S. 573, 580–81 (2022) ("[T]here is no plausible construction of the text of § 1231(a)(6) that requires the Government to provide bond hearings before immigration judges after six months of detention...."); *Guzman Chavez*, 594 U.S. at 549–50 (holding that § 1231, not § 1226, governs detention of noncitizens pursuing withholding-only relief). Neither decides whether removal is reasonably foreseeable under *Zadvydas*, and neither addresses the process due before removal to an undesignated third country. Petitioner does not ask this Court to revisit either holding.

D. The Balance of Harms and the Public Interest Favor Maintaining the Status Quo Pending Resolution of the Petition.

Respondents' Return does not identify any harm from maintaining the status quo beyond the

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IV. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court deny Respondents' Response to the Order to Show Cause, deny Respondents' Motion to Modify Judgment, and grant the Petition by (1) ordering Petitioner's release under 8 U.S.C. § 1231(a)(6) subject to appropriate conditions of supervision under 8 C.F.R. § 241.5; and (2) enjoining Respondents from removing Petitioner to the Central African Republic, or any other country not designated in his December 31, 2025 order, unless Respondents: (a) provide Petitioner and his counsel written notice of the country and the statutory basis for the designation, and a minimum of ten days to raise a fear-based claim for protection prior to removal; (b) if Petitioner demonstrates reasonable fear of removal to that country, move to reopen his removal proceedings; and (c) if Petitioner is not found to have demonstrated reasonable fear, provide him a meaningful opportunity, and a minimum of fifteen days, to seek reopening of his removal proceedings on his own initiative; and (3) in the event Petitioner asserts a fear-based claim, enjoining Respondents from removing him without first providing a meaningful opportunity to be heard on that claim before an immigration judge, consistent with due process. *See* 8 C.F.R. § 1240.12(d); *Andriasian*, 180 F.3d at 1041; D.V.D., 2025 WL 1453640, at *1; accord *Hoang v. Chestnut*, 2026 WL 1965614, at *2 (E.D. Cal. July 7, 2026) (ordering materially identical relief on this same record of DHS third-country removal practice).

Date: July 22, 2026

Respectfully Submitted,

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