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12 UNITED STATES DISTRICT COURT
13 FOR THE CENTRAL DISTRICT OF CALIFORNIA
14 EASTERN DIVISION

15 SUNDAY KAYODE KUNKUSHI,

16 Petitioner,

17 v.

18 WARDEN, Desert View Annex;
ERNESTO SANTACRUZ, JR, Acting
19 Field Office Director of Los Angeles
U.S. Immigration and Customs
Enforcement Field Office; KRISTI
20 NOEM, Secretary of the U.S.
Department of Homeland Security; and
21 PAMELA BONDI, Attorney General of
the United States, in their official
22 capacities,

23 Respondents.
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No. 5:25-cv-01608-SRM-PVC

**FEDERAL RESPONDENTS'
OPPOSITION TO PETITIONER'S
MOTION FOR LEAVE TO AMEND
PLEADINGS**

[No Hearing Requested]

[(Proposed) Order filed concurrently
herewith]

Honorable Serena R. Murillo
United States District Judge

Honorable Pedro V. Castillo
United States Magistrate Judge

I. INTRODUCTION

The Court should deny Petitioner's motion for leave to amend (Dkt. 22 ("Mot.")) because it is procedurally improper and substantively meritless. Procedurally, despite admitting that the motion to reopen his removal proceedings before the Board of Immigration Appeals ("BIA") was filed on September 2, 2025 (Mot. at 3:1-7), Petitioner's counsel still failed to meet and confer with Respondents' counsel regarding the instant motion as required under Local Rule 7-3. The instant motion fails to include a declaration from Petitioner's counsel explaining why one of Petitioner's two attorneys – Veronica Barba or Nancy Alexander – did not even attempt to meet and confer with Respondents' counsel before filing the instant motion.¹

Substantively, Petitioner fails to address how his amended complaint would remedy any of the defects identified by Magistrate Judge Castillo recommending that the Court deny his petition for writ of habeas corpus, dismiss this action without prejudice, and strike the order that Petitioner is not to be removed from this jurisdiction. Dkt. 18 ("R&R"). Indeed, this Court lacks jurisdiction to stay Petitioner's removal, which is the intended effect of the instant motion. Congress explicitly provided that federal courts lack jurisdiction to hear any cause or claim arising from the execution of a removal order, which Petitioner's new claims unmistakably do. *See* 8 U.S.C. § 1252(g). Moreover, to the extent that Petitioner is now challenging how the Immigration Judge ("IJ"), the BIA, and Ninth Circuit have interpreted and applied constitutional or statutory provisions, jurisdiction is likewise barred. *See* 8 U.S.C. §§ 1252(a)(5), 1252(b)(9). Last, Petitioner has failed to establish unlawful delay by the BIA in failing to rule on his recently filed motion to reopen. Thus, the Court should deny Petitioner's motion because leave to amend should not be granted when amendment would be futile, and futility alone is enough to refuse amendment.

Accordingly, Respondents respectfully request that the Court deny Petitioner's

¹ Petitioner also failed to comply with Local Rule 7-4 by failing to notice a hearing date.

1 motion for leave to amend and adopt the Report and Recommendation because this
2 Court lacks the jurisdiction to grant the remedy Petitioner seeks.

3 **II. STATEMENT OF RELEVANT FACTS AND PROCEDURAL HISTORY**

4 On June 4, 2025, Petitioner was re-detained by ICE for removal from the United
5 States. R&R at 3:23-24. On July 10, 2025, ICE requested a re-issuance of travel
6 documents to remove Petitioner to Nigeria. *Id.* at 3:24-25. On July 14, 2025, ICE served
7 Petitioner with a Notice of Revocation of Supervision. *Id.* at 3:25-26. On August 18,
8 2025, ICE officials received Petitioner's travel documents to Nigeria that were issued by
9 the Embassy of Nigeria on July 22, 2025. *Id.* at 3:26-28. Petitioner was originally
10 scheduled to be removed from the United States by commercial flight to Nigeria on
11 September 16, 2025. *Id.* at 4:1-2. However, Petitioner currently remains in ICE custody
12 at Desert View Annex in Adelanto, CA, awaiting removal. *Id.* at 4:3-4.

13 On September 8, 2025, the Court having "reviewed the Notice of Petitioner's
14 Scheduled Removal filed by Respondents" scheduled a hearing for September 10, 2025.
15 Dkt. 14. On September 9, 2025, Petitioner filed a notice "informing the Court that he
16 filed a motion to reopen his removal proceedings on September 3, 2025," and "an
17 emergency motion to stay his removal with the BIA while it adjudicates his motion to
18 reopen." Dkt. 15. On September 10, 2025, the parties appeared before Magistrate Judge
19 Castillo where arguments were heard on Respondent's Notice of Petitioner's Scheduled
20 Removal and Petitioner's Notice of Motion to Reopen. Dkt. 16. "The Court reiterated its
21 ORDER that Petitioner is not to be removed from this jurisdiction until Petitioners
22 habeas Petition is resolved." *Id.* On September 11, 2025, the Court issued its Report and
23 Recommendation recommending "that the District Court issue an Order: (1) accepting
24 and adopting this Report and Recommendation, (2) denying the Petition for Writ of
25 Habeas Corpus, (3) directing that Judgment be entered dismissing this action without
26 prejudice; and (4) striking the ORDER that Petitioner is not to be removed from this
27 jurisdiction (Dkt. Nos. 9 & 16)." Dkt. 18.

28 On September 12, 2025, the Court ordered that written objections to the Report

1 and Recommendation were due by September 15, 2025, at 12:00 PM. Dkt. 19. On
2 September 15, 2025, Petitioner filed his objection to the Report and Recommendation
3 (Dkt. 20) and the instant motion for leave to file an amended complaint. Dkt. 21. The
4 same day, the Court ordered Respondents to respond to the instant motion by September
5 17, 2025, and for Petitioner to file a reply no later than September 19, 2025. Dkt. 22.
6 This opposition follows because amendment is futile.

7 **III. ARGUMENT**

8 **A. This Court Lacks Jurisdiction to Enjoin the Government from** 9 **Enforcing Removal Orders under 8 U.S.C. § 1252**

10 The Court lacks jurisdiction to stay Petitioner's removal under the plain terms of
11 the Immigration and Nationality Act. District courts are not a generalized 'backstop' for
12 reviewing or overturning immigration decisions with which a noncitizen disagrees. In
13 the immigration context, Congress stripped district courts of jurisdiction to consider
14 cases arising from the execution of removal orders by passing the Illegal Immigration
15 Reform and Immigrant Responsibility Act of 1996, 110 Stat. 3009-546 ("IIRIRA").

16 Under the IIRIRA, Congress repealed the prior scheme for district court review of
17 removal orders and replaced it with more restrictive procedures. 8 U.S.C. §1252; *Reno v.*
18 *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 474 (1999). Among other
19 jurisdiction-stripping provisions in the IIRIRA, 8 U.S.C. §1252(g) deprives district
20 courts of jurisdiction "to hear any cause or claim . . . arising from the decision or action
21 by the [Secretary of Homeland Security] to commence proceedings, adjudicate cases, or
22 execute removal orders." Further, §1252(a)(2) bars district courts from reviewing most
23 aspects of the removal process, subject to certain narrow enumerated statutory
24 exceptions that do not apply here. Section 1252(b)(2) provides that judicial review of
25 removal orders is vested only in the appellate courts, not in the district courts.

26 Courts in this district and others have consistently held that actions seeking a stay
27 of execution of a removal order arise from the execution of a removal order and are thus
28 barred by §1252(g). *See, e.g., Pacheco-Escobar v. Unnamed Respondents*, 2014 WL

1 2932402, at *2 (S.D. Cal. June 30, 2014) (denying motion for “stay of removal pending
2 resolution of the petition for review” because court lacked jurisdiction under §1252(g));
3 *Alfaro-Mejia v. Holder*, [2013 WL 599876](#), at *2 (C.D. Cal. Feb. 15, 2013) (dismissing
4 for lack of jurisdiction because petitioner sought “an order enjoining the government
5 from executing a removal order”); *Rosales v. Aitken*, [2011 WL 4412654](#), at *3 (N.D.
6 Cal. Sep. 21, 2011) (holding that, “regardless of how Petitioner frames this motion,
7 [because] Petitioner seeks to halt the execution of the final orders of removal” the Court
8 lacked jurisdiction); *De Leon v. Napolitano*, [2009 WL 4823358](#), at *3 (N.D. Cal. Dec.
9 10, 2009) (finding it “clear that . . . [a] request to halt the execution of the final orders of
10 removal ‘arise[s] from’ an ‘action’ or a ‘proceeding’ brought in connection with
11 Petitioner’s removal, or from ‘the decision or action’ to ‘execute removal orders against’
12 Petitioner”); *Paljusevic v. Dedvukaj*, [2009 WL 3125540](#), at *2 (E.D. Mich. Sept. 25,
13 2009) (finding no jurisdiction under §1252(g) even though petitioner claimed he was
14 only challenging “the decision to execute the order while his properly-filed, adjustment-
15 of-status petition [was] pending”); *Mejia-Espinoza v. Mukasey*, [2009 WL 235625](#), at *3
16 (C.D. Cal. Jan. 27, 2009) (holding that district court lacked jurisdiction where petitioners
17 sought to enjoin the government from executing their removal orders); *Nken v. Chertoff*,
18 [559 F. Supp. 2d 32, 36](#) (D.D.C. 2008) (finding that considering “a stay of the BIA’s final
19 order of removal, . . . would require [the] Court to review that final order” and, was thus,
20 beyond the court’s jurisdiction).

21 Moreover, §§1252(a)(5) and 1252(b)(9), taken together, channel review of any
22 issues arising out of removal proceedings to the petition for review (“PFR”) process in
23 the Court of Appeals. This means that any issue—whether legal or factual—arising from
24 any removal related activity can be reviewed only through the PFR process. *J.E.F.M. v.*
25 *Lynch*, [837 F.3d 1026, 1031](#) (9th Cir. 2016). Under this framework, the sole and
26 exclusive means for challenging any issues rising during removal proceedings before
27 issuance of a final order of removal is a timely PFR in the appropriate court of appeals.
28 See [8 U.S.C. §§ 1252\(a\)\(5\); 1252\(b\)\(9\)](#) (“Judicial review of all questions of law and

1 fact arising from any action taken or proceeding brought to remove an alien from the
2 United States...shall be available only in judicial review of a final order under this
3 section”). This jurisdictional limit reflects the Congressional intent to preclude federal
4 courts from interfering with ongoing immigration court processes by reviewing and
5 overturning individualized decisions on interlocutory issues, such as whether stays
6 should be issued. The Supreme Court has characterized §1252(b)(9) as a “zipper clause,”
7 explaining that the statute’s purpose is to consolidate “judicial review” of immigration
8 proceedings in one action in the court of appeals. *See J.E.F.M. v. Lynch*, 837 F.3d at
9 1031. By channeling questions “arising from any actions taken or proceedings brought to
10 remove an alien from the United States,” §1252(b)(9) excludes claims that do not arise
11 from removal proceedings. *Id.* at 1032.

12 Here, Petitioner’s new claims are insupportable because they are directly
13 challenging “the decision by the Attorney General to commence proceedings, adjudicate
14 cases, or execute removal orders against any alien under this chapter.” 8 U.S.C.
15 §1252(g). Petitioner couches his claim with the pretext of needing a stay pending BIA
16 consideration of his motion to reopen. However, Petitioner cites no authority for a stay in
17 the district court during the pendency of his motion to reopen. Indeed, the law is to the
18 contrary; Petitioner must request and be granted a stay by the BIA. However, the BIA
19 has already considered and rejected his stay request. *See Mot.* at 3:26-27.

20 Similarly, Petitioner’s claims regarding additional due process owed by reason of
21 his purported mental illness or unsubstantiated fears of torture are precisely the type of
22 “issues arising out of removal proceedings” that are channeled to the PFR process in the
23 Court of Appeals by 8 U.S.C. §§1252(a)(5) and 1252(b)(9). *See J.E.F.M. v. Lynch*, at
24 1032-33 (holding that noncitizen minor’s right-to-counsel claims must be raised through
25 the PFR process because they “arise from” removal proceedings).

26 Petitioner’s asserted bases for jurisdiction, including the Administrative
27 Procedures Act (“APA”), cannot overcome the jurisdictional bar of 8 U.S.C. §1252.
28 Indeed, the APA cannot provide the basis for Court review of agency decisions where

1 Congress has created a statute that expressly precludes such judicial review. *See* 5 U.S.C.
2 § 701(a)(1) (agency actions are not reviewable under the APA where “statutes preclude
3 judicial review”) Here, §1252(g) specifically precludes the Court from exercising
4 jurisdiction under the APA. Further, the APA does not confer jurisdiction where, as here,
5 there is an adequate remedy. *See* 5 U.S.C. § 704 (APA review available where “there is
6 no other adequate remedy in a court”).

7 Petitioner is also unable to sustain his due process violation claims, because he has
8 repeatedly engaged the adjudicative process before an immigration judge, the BIA and
9 the Ninth Circuit. R&R at 3:6-11. Petitioner’s refusal to accept these decisions does not
10 establish denial of due process. Indeed, due process is not violated because a party fails
11 to win or disagrees on the merits. The district court is precluded from the process that
12 Congress entrusted to the immigration court system and the appellate courts. *See* 8
13 U.S.C. §§1252(a)(5), 1252(b)(9). Instead, Petitioner is attempting to use this forum to
14 overrule and subvert the BIA’s denials of a stay of enforcement of his final removal
15 order and overthrow the specific limitations that Congress imposed by enacting 8 U.S.C.
16 §1252. He is not permitted to do so.

17 Accordingly, this Court lacks jurisdiction to bar Respondents from enforcing the
18 lawful final removal order.

19 **B. Petitioner Has Not Established Unlawful Delay by the BIA in Failing to**
20 **Rule on his Recently Filed Motion to Reopen**

21 Petitioner’s claim that the BIA violated the APA in failing to adjudicate his
22 motion to reopen within “almost two weeks” of filing, or else grant him a stay of
23 removal (Dkt. 21-2 at ¶¶ 84-89) is fatally flawed. First, under 5 U.S.C. § 701(a)(1),
24 agency actions are not reviewable under the APA where “statutes preclude judicial
25 review.” As explained above, this Court lacks jurisdiction to effectively enjoin
26 enforcement of Petitioner’s removal order under 8 U.S.C. § 1252. Second, even
27 assuming jurisdiction exists, Petitioner has not established unreasonable delay. Indeed,
28 Petitioner cites no authority ordering the BIA to issue a ruling on a pending motion

1 within a given time frame, nor has Petitioner analyzed the application of the “*TRAC*
2 factors” to this case. The *TRAC* factors clearly favor Respondents and the BIA, as there
3 is nothing *per se* unreasonable about a motion to reopen pending for “almost two
4 weeks.” *See, e.g., L.M. v. Johnson*, 150 F. Supp. 3d 202, 214 (E.D.N.Y. 2015) (“It is not
5 unreasonable for delays to occur . . . where an agency with limited resources is
6 attempting to adjudicate an ever-increasing number of applications.”).

7 Petitioner fails to explain why the interests of justice require his application to be
8 advanced to the front of the BIA’s queue. As many courts have recognized in the context
9 of processing immigration applications, the effects of expediting adjudication of
10 Petitioner’s application would prejudice all other applications that have been pending
11 adjudication as long, if not longer. “A judicial order putting [Petitioner] at the head of
12 the queue would simply move all others back one space and produce no net gain.” *Xu v.*
13 *Cissna*, 434 F. Supp. 3d 43, 54 (S.D.N.Y. 2020) (citation, brackets, and quotation marks
14 omitted); *see also Zhu v. Cissna*, 2019 WL 3064458, at *3 (C.D. Cal. Apr. 22, 2019) (no
15 jurisdiction under the APA where statute does not compel agency to adjudicate asylum
16 applications within a certain period). This logic holds true here.

17 Because Petitioner articulates no sound basis for contending that the BIA has
18 “unlawfully” or unreasonably failed to rule on his two-week motion to reopen, his APA
19 claim fails.

20 **C. Petitioner Does Not Have a Due Process Right to Remain in the United**
21 **States**

22 Petitioner contends that his removal pursuant to a duly authorized final order of
23 removal would violate due process where, as here, he has a motion to reopen pending
24 with the BIA. *See generally Dkt. 21-2*. Petitioner is incorrect.

25 The Due Process Clause of the Fifth Amendment guarantees that “[n]o person
26 shall be deprived of life, liberty, or property, without due process of law.” U.S. CONST.
27 amend. V, cl. 4. Petitioner must thus begin by identifying a relevant liberty or property
28 interest. *Wooten v. Clifton Forge Sch. Bd.*, 655 F.2d 552, 554 (4th Cir. 1981). An

1 individual has a procedural due process interest in a benefit only if he or she has a
2 “legitimate claim of entitlement to it.” *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S.
3 748, 749 (2005); *Ky. Dept. of Corrections v. Thompson*, 490 U.S. 454, 460 (1989);
4 *United States v. Guillen-Cervantes*, 748 F.3d 870, 872-73 (9th Cir. 2014); *Doyle v.*
5 *Medford*, 606 F.3d 667, 674-75 (9th Cir. 2010). A due process interest arises from a
6 source of positive law, such as a statute or regulation, only when the regulation sets forth
7 “substantive predicates to govern official decision making and, second, it must contain
8 explicitly mandatory language, *i.e.*, a specific directive to the decision maker that
9 mandates a particular outcome if the substantive predicates have been met.” *Valdez v.*
10 *Rosenbaum*, 302 F.3d 1039, 1044 (9th Cir. 2002) (internal quotations and citations
11 omitted).

12 An “expectation of receiving process is not, without more, a liberty interest
13 protected by the Due Process Clause.” *Olin v. Wakinekona*, 461 U.S. 238, 250 (1983).
14 Courts must start with the premise that removal “is not a criminal proceeding and has
15 never been held to be punishment” and thus “no judicial review is guaranteed by the
16 Constitution.” *Carlson v. Landon*, 342 U.S. 524, 537 (2007); *Duldaloa v. INS*, 90 F.3d
17 396, 400 (9th Cir. 1996) (quoting *Carlson*, 342 U.S. at 537).

18 Here, the record reflects that Petitioner was ordered removed after a full
19 administrative hearing and opportunity for judicial review. Petitioner has filed appeals
20 with the BIA and the Ninth Circuit, a motion to reopen with the BIA, and a request for
21 an emergency stay with the BIA, which was recently rejected. Petitioner has no
22 entitlement or protected liberty interest in remaining in the United States while his
23 motion to reopen is adjudicated.

24 To the extent that Petitioner argues that the Convention Against Torture (“CAT”)
25 or regulations concerning motions to reopen provide him with a due process right to
26 remain in the United States during the pendency of his motion to reopen, he is incorrect.
27 See Dkt. 21-2 at ¶ 48. CAT contains no express procedural guarantee that a motion to
28 reopen must be heard prior to removal. Nor does 8 C.F.R. § 1003.2, concerning motions

1 for reopening or reconsideration before the BIA. Accordingly, Petitioner cannot establish
2 a substantive due process right to remain in the United States while he pursues his
3 motion to reopen.

4 Further, the fact that Petitioner's claim is based on a purported fear to return to his
5 country of citizenship does not change the outcome because he lacks any substantive due
6 process right to remain in the United States while his motion to reopen is adjudicated. To
7 hold otherwise would be "contrary to more than a century of precedent." *Dept. of*
8 *Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959, 1982 (2020). "Aliens paroled
9 elsewhere in the country pending removal are treated for due process purposes as if
10 stopped at the border." *Romero v. Garland*, 999 F.3d 656, 661 (9th Cir. 2021) (citing
11 *Thuraissigiam*, 140 S. Ct. at 1982). For these reasons, Petitioner has "only those rights"
12 regarding review of his final order of removal "that Congress has provided by statute."
13 *Thuraissigiam*, 140 S. Ct. at 1983.

14 Petitioner has the right, which he has exercised, to file a motion to reopen and
15 have the BIA review a request for a stay of removal, he does not have a due process right
16 to remain in the United States while his motion to reopen is being adjudicated "[b]ecause
17 the Due Process Clause provides nothing more." *Id.*

18 **D. The Court Should Deny Leave to Amend**

19 Leave to amend should not be granted when amendment would be futile, and
20 futility alone is enough to refuse amendment. *See United States v. SmithKline Beecham*
21 *Clinical Labs*, 245 F.3d 1048, 1052 (9th Cir. 2001); *Lipton v. Pathogenesis Corp.*, 284
22 F.3d 1027, 1039 (9th Cir. 2002) (holding that "[b]ecause any amendment would be
23 futile, there was no need to prolong the litigation by permitting further amendment").
24 Here, amendment would be futile because this Court lacks jurisdiction under 8 U.S.C. §
25 1252, the BIA has not unlawfully delayed ruling on Petitioner's recently filed motion to
26 reopen, and Petitioner does not have a substantive due process right to remain in the
27 United States while his motion to reopen is adjudicated.

1 **IV. CONCLUSION**

2 For the foregoing reasons, Respondents respectfully request that the Court adopt
3 the Report and Recommendation, deny Petitioner's motion for leave to amend, deny the
4 petition for writ of habeas corpus, and dismiss this action without prejudice.

5
6 Dated: September 17, 2025

Respectfully submitted,

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16 **Certificate of Compliance under L.R. 11-6.2**

17 Counsel of record for the United States, certifies that this brief contains 3,209
18 words, which complies with the word limit of L.R. 11-6.1.