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**UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION**

Sunday Kayode Kunkushi,

Plaintiff,

v.

Warden, Desert View Annex; **Ernesto Santacruz Jr.** Acting Field Office Director of Los Angeles Field Office, U.S. Immigration and Customs Enforcement; **Kristi Noem**, Secretary of the U.S. Department of Homeland Security; and **Pamela J. Bondi**, Attorney General of the United States, **Sirce E. Owen**, Acting Director, Executive Office for Immigration Review, **Garry D. Malphrus**, Chief Appellate Immigration Judge, in their official capacities,

Defendants.

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

**REPLY IN SUPPORT OF MOTION
TO AMEND PLEADINGS**

Honorable Serena R. Murillo
United States District Judge

Honorable Pedro V. Castillo
United States Magistrate Judge

1 Mr. Sunday Kunkushi, through Counsel, here replies to Federal Respondent's
2 opposition to his motion for leave to amend the pleadings.

3 Respondent's opposition provides no response to Mr. Kunkushi's allegations that
4 Immigration and Customs Enforcement's (ICE's) re-detention of him without notice and a
5 formal and informal interview violated its own regulations and Mr. Kunkushi's procedural
6 due process rights. 8 C.F.R. § 241.13(i)(3); *Nak Kim Chhoeun v. Marin*, 442 F. Supp. 3d
7 1233, 1244–1251 (C.D. Cal. 2020); *United States ex rel Accardi v. Shaughnessy*, 347 U.S.
8 260, 268 (1954) (Government agencies are required to follow their own regulations). Mr.
9 Kunkushi does not merely assert that his removal would violate due process because he
10 has a motion to reopen pending as Respondent's characterize, (Doc. No. 23 at 7), but
11 instead alleges that his procedural due process rights were violated when ICE failed to
12 provide him notice of his detention and formal and informal interview after almost 5 years
13 at liberty and the BIA now fails to adjudicate his motion reopen expeditiously denying him
14 the right to seek judicial review of its denial of his stay of removal.

15 Procedurally, Counsel notes Respondent's concerns on failure to follow Local Rule
16 7-3 and 7-4. Local Rule 7-4 appears to read as inapplicable to motions in habeas cases,
17 like this one. Local Rule 7-3; Rule 16-2. Counsel will be sure to follow both Local Rules
18 in regard to future motions in this matter.

19 **1. This Court has jurisdiction over Mr. Kunkushi's claims.**

20 Contrary to the Respondent's assertion, Mr. Kunkushi does not ask this Court to stay
21 his removal indefinitely nor is he seeking review by this Court of an Agency decision on
22 an immigration matter. Rather, his claims that ICE violated its own regulations and his
23 procedural due process rights when he was not provided adequate notice prior to re-
24 detention, and the BIA's denial of the right to judicial review of his stay request, do "not
25 arise from a 'decision or action by the Attorney General to commence proceedings,
26 adjudicate cases, or execute removal orders against any [non-citizen],' but instead
27 constitute 'general collateral challenges to unconstitutional practices and policies used by
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1 the agency.” *Ibarra-Perez v. United States*, Case No. 24-631, 2025 U.S. App. LEXIS
2 22089, *21–22 (9th Cir. 2025); *see also Delkash v. Noem*, Case No. 5:25-cv-01675-HDV-
3 AGR, (C.D. Cal. Aug. 28, 2025) (providing that “the court can hear a non-citizen’s claims
4 where, as here, a non citizen is challenging “advance notice and an opportunity to have a
5 hearing . . . to determine the lawfulness of re-detention prior to taking [him] into custody”);
6 *Garcia v. Andrews*, Case No. 2:25-cv-01884-TLN-SCR, 2025 U.S. Dist. LEXIS 133521,
7 *3 (E.D. Cal. July 14, 2025) (“Section 1252(g) strips a court of jurisdiction to enjoin the
8 removal of a noncitizen when a noncitizen challenges the removal itself. Here, however,
9 the basis of Petitioner’s claim is not a challenge to a removal but rather, that his re-detention
10 is unconstitutional. As such, § 1252(g) is inapplicable...”); *Sied v. Nielsen*, Case. No. 17-
11 cv-06785-LB, 2018 U.S. Dist. LEXIS 35696, *8 (N.D. Cal. March 2, 2018) (“Mr. Sied has
12 met the requirements for a preliminary injunction staying his deportation, and the court
13 therefore enjoins the government from removing Mr. Sied from the United States while his
14 motion-to-reopen process is pending”).

15 As the Respondent notes, Section 1252(b)(2) provides that judicial review of agency
16 actions is vested with appellate courts, not district courts. The Agency here, through denial
17 of the emergency stay without adjudicating the underlying motion to reopen, prevents Mr.
18 Kunkushi from seeking judicial review by leaving him without a final order to seek review
19 of.

20 The Respondent’s opposition does not account for the recent Ninth Circuit decision
21 in *Ibarra-Perez v. United States* where the Panel clarified that limits to federal court
22 jurisdiction over immigration matters are narrow. *Ibarra-Perez v. United States*, Case No.
23 24-631, 2025 U.S. App. LEXIS 22089, *20 (9th Cir. 2025). 8 U.S.C. § 1252(g) does not
24 bar not “prohibit challenges to unlawful practices merely because they are in some fashion
25 connected to removal orders.” *Id.* at *21. 8 USC § 1252(g) does not bar due process claims
26 as raised here. *Id. citing Walters v. Reno*, 145 F.3d 1032 (9th Cir. 1998).

27 The cases Respondent cites finding lack of jurisdiction are distinguishable and
28 decided prior to *Ibarra-Perez*.

1 In *Pacheco Escobar*, the Southern District addressed the claim of a *pro se* habeas
2 petitioner with a final order from the Ninth Circuit who, unlike Mr. Kunkushi, did not have
3 a motion to reopen pending before the BIA or allege unlawful revocation of release.
4 *Pacheco-Escobar v. Unnamed Respondents*, Case No. 14-cv-829-BAS(KSC), 2014 U.S.
5 Dist. LEXIS 89485, *1 (S.D. Cal. June 30, 2014).

6 The Central District in *Alfaro-Mejia v. Holder* recognized that the Court has
7 jurisdiction where “a successful habeas petition in [the] case will lead to nothing more than
8 ‘a day in court.’” *Alfaro-Mejia v. Holder*, Case No. 13-795-JAK (AJW), 2013 U.S. Dist.
9 LEXIS 31981, *6 (C.D. Cal. Feb. 13, 2013) *citing* *Singh v. Gonzales*, 499 F.3d 969, 979
10 (9th Cir. 2007). Though the Court found it lacked jurisdiction in Ms. Alfaro-Mejia’s case
11 because “petitioner does not seek to have a petition for review considered by the Court of
12 Appeals. Instead, she seeks an order enjoining the government from executing a removal
13 order, and an order reversing the BIA’s denial of her motion to reopen and requiring the
14 BIA to consider her claim of asylum.” *Id.* at *6. In other words, a review of her final order.
15 *Id.* at *6–*7. Mr. Kunkushi does not ask for a review of his final removal order, as in
16 *Alfaro-Mejia*, but asks for a “day in court,” as in *Singh*, as he is seeking BIA review of his
17 motion to reopen based on his fear of future torture prior to his removal to Nigeria.
18 *Amended Complaint, Doc. No. 21-2 at 14–17.*

19 In *Rosales v. Aitken*, Petitioner Rosales had already had her claims heard by the BIA
20 and Ninth Circuit as her motion to reopen was denied by the BIA and subsequent petition
21 for review dismissed by the Ninth Circuit. *Rosales v. Aitken*, Case No. 11-CV-4246-LHK,
22 2011 U.S. Dist. LEXIS 108256, *5–6 (N. D. Cal. Sept. 21, 2011). The Court reasoned that
23 “Petitioner is not in a situation in which he asserts a constitutional or statutory issue and
24 has been unable to bring his claims to *any* court for relief.” *Id.* at *8–10. Not so here where
25 Mr. Kunkushi raises regulatory violations and challenges the BIA’s failure to consider his
26 first motion to reopen prior to removal, depriving him of his right to seek a judicial stay of
27 removal from the Ninth Circuit. 8 U.S.C. § 1252(b)(3)(B).

1 In *De Leon v. Napolitano*, the Northern District found that Petitioner sought an order
2 vacating the Agency's underlying actions of denying her stay and denying her application
3 for deferral. *De Leon v. Napolitano*, Case No. C 09-3664 JW, 2009 U.S. Dist. LEXIS
4 121729, *8-9 (N.D. Cal. Dec. 9, 2009). The Court further found no constitutional
5 violations at issue. *Id.* at *9. Here, Mr. Kunkushi does not ask this Court to review the
6 BIA's denial of his stay or (potential) denial of his statutory motion to reopen. Rather he
7 asks that the BIA decide his motion to reopen in a timeframe that allow him to exercise his
8 right to seek a judicial stay with the Ninth Circuit. *Amended Complaint*, Doc. No. 21-2 at
9 14-17. Also unlike the Petitioner in *De Leon*, he raises regulatory and procedural due
10 process violations. *Amended Complaint*, Doc. No. 21-2 at 17-21. Similarly, the Court in
11 *Paljusevic* did not address the procedural due process violations raised here. *Paljusevic v.*
12 *Dedvukaj*, Case No. 09-13659, 2009 U.S. Dist. LEXIS 88500, *3-4 (E.D. Mich. Sept. 25,
13 2009) (distinguishing *Paljusevic*'s case from *Mustata v. U.S. Dep't of Justice*, 179 F.3d
14 1017 (6th Cir. 1999), where ineffective assistance of counsel due process violations were
15 alleged and jurisdiction found).

16 The Central District of California's decision in *Mejia-Espinoza v. Mukasey*, Case
17 No. CV 08-7984-FMC (PLA), 2009 U.S. Dist. LEXIS 127321 (C.D. Cal. Jan. 5, 2009),
18 was called into question by the Central District in *Villanueva-Bustillos v. Marin*.
19 *Villanueva-Bustillos v. Marin*, 370 F. Supp. 3d 1083, 1088 (C.D. Cal. Oct. 23, 2018). In
20 circumstances similar to Mr. Kunkushi's, the Central District in *Villanueva-Bustillos* found
21 jurisdiction because "Petitioner challenges not only his final order of removal, but also due
22 process violations arising from the failure of the IJ to address his request for a credible or
23 reasonable fear interview...it appears that he is challenging, on due process grounds, the
24 denial of a meaningful opportunity to be heard on his motion to reopen, which is itself
25 based in part on the assertion that he is entitled to asylum or withholding of removal on the
26 grounds of changed country conditions in his home country of Honduras."
27 *Villanueva-Bustillos*, 370 F. Supp. 3d at 1089.

1 In *Nken* “the emergency portion of the Emergency Petition in this case asks this
2 Court to stay the execution of the BIA’s final order of removal — *upheld by the Fourth*
3 *Circuit* — and thus clearly ‘arise[s] from’ an ‘action’ or a ‘proceeding’ brought in
4 connection with his removal. *Nken v. Chertoff*, 559 F. Supp. 2d 32, 37 (D.D.C 2008).
5 Here, the denial of Mr. Kunkushi’s stay of removal has not been upheld by the Ninth
6 Circuit, nor is he provided with an opportunity to seek judicial review of the stay because
7 the BIA refuses to concurrently decide his motion to reopen with his stay request.

8 Respondent states that “Petitioner couches his claim with the pretext of needing a
9 stay pending BIA consideration of his motion to reopen. However, Petitioner cites no
10 authority for a stay in the district court during the pendency of his motion to reopen.” Doc.
11 No. 23 at 5. The Northern District’s decision in *Sied* in addition the argument and authority
12 set out above provide that authority. *Sied v. Nielsen*, Case No. 17-cv-06785-LB, 2018 U.S.
13 Dist. LEXIS 35696 at *6–7 (finding jurisdiction to consider habeas claim and enjoining
14 removal while motion to reopen based on change country conditions pending and stating
15 to do otherwise “leaves Mr. Sied with the Kafkaesque prospect that the government might
16 deport him to Eritrea to be tortured or killed, while he awaits a hearing and decision on his
17 motion that he should not be deported to Eritrea because he would be tortured or
18 killed there”).

19 Mr. Kunkushi agrees with Respondent that the means to challenge a (potential)
20 denial of his motion to reopen by the BIA is through a timely filed PFR with the appropriate
21 court of appeals. Doc. No. 23 at 4. However, Mr. Kunkushi cannot file that PFR until the
22 BIA renders a final decision on his motion to reopen and is currently left with no means of
23 seeking judicial review.

24 **2. Mr. Kunkushi has established unlawful delay.**

25 The BIA has a duty to adjudicate Mr. Kunkushi’s pending motion to reopen. 8 C.F.R.
26 § 1003.2(a); BIA Practice Manual Ch. 5.2(a)(III)(A) & Ch. 6.3(a). BIA regulations favor
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1 the prompt resolution of matters, “...with a priority for detained cases.” 8 C.F.R. §
2 1003.1(e)(8).

3 Where neither the immigration statute nor regulations provide a timeline for
4 adjudication of a motion to reopen filed by an individual in government custody, under the
5 “rule of reason,” this Court can look to various factors in concluding, as Mr. Kunkushi
6 urges, that a wait of over two weeks for adjudication of a motion to reopen — in the face
7 of imminent removal, while in government custody — is unreasonable. *See Ruiz v. Wolf*,
8 Case No. 20 C 4276, 2020 U.S. Dist. LEXIS 212816, (N.D. Ill. Nov. 20, 2020) (*citing*
9 *Research & Action Ctr. v. F.C.C.* (“TRAC”), 750 F.2d 70, 80 (D.C. Cir. 1984).
10 Importantly, where there are no clearly delineated timeframes for agency action, a court
11 should consider that “...delays that might be reasonable in the sphere of economic
12 regulation are less tolerable when human health and welfare are at stake,” “the effect of
13 expediting delayed action on agency activities of a higher or competing priority...” as well
14 as “...the nature and extent of the interests prejudiced by the delay...” *Id.* The “court need
15 not find any impropriety lurking behind agency lassitude in order to hold that agency action
16 is unreasonably delayed.” *Id.*

17 The “nature and extent of the interests prejudiced by delay” are weighty here. Mr.
18 Kunkushi seeks adjudication of his motion to reopen his proceedings on the basis of a claim
19 for protection under the Convention Against Torture. This form of protection is mandatory
20 in nature. 8 C.F.R. § 1208.17(a). As previously noted, if the BIA does not timely rule on
21 his motion to reopen, his ability to pursue a judicial stay of removal is extinguished.

22 The fact that Mr. Kunkushi now faces a specific date of removal, when his right to
23 a judicial review of his stay request is extinguished absent action by the BIA, puts him on
24 different footing than others awaiting adjudication. *See Calderon-Ramirez v. McCament*,
25 877 F.3d 272, 276 (7th Cir. 2017) (in the U visa context, “[e]nforcement can and will
26 expedite a petition”).
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1 For these reasons, the Court should grant Mr. Kunkushi's motion for leave to amend
2 the pleadings.

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4 Dated: September 19, 2025

Respectfully Submitted,

s/Nancy Alexander

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18 The undersigned, counsel of record for the Petitioner, certifies that this brief contains
19 2,193 words, which complies with the word limit of L.R. 11-6.1.

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21 Date: 09/19/2025

s/Nancy Alexander

Nancy Alexander