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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

Thoth SUN,

Petitioners,

v.

Kristi NOEM, Secretary, Department
of Homeland Security; Pam BONDI,
Attorney General; Todd LYONS,
Executive Associate Director of ICE
Enforcement and Removal
Operations (ERO); Gregory J.
ARCHAMBEAULT, Director, San
Diego Filed Office, Immigration and
Customs Enforcement; Christopher J.
LAROSE, Warden, Otay Mesa
Detention Center.

Respondents.

No. 3:25-cv-02433-CAB-MMP

PETITIONER'S REPLY TO *EX*
PARTE APPLICATION FOR
TEMPORARY RESTRAINING
ORDER AND ORDER TO SHOW
CAUSE RE: PRELIMINARY
INJUNCTION

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2 **I. INTRODUCTION**

3 Petitioner Thoth Sun replies to Respondent's Opposition to his *Ex Parte*
4 Application for Temporary Restraining Order preventing his re-detention by
5 immigration authorities on October 1, 2025, absent evidence that immigration
6 authorities are reasonably likely to remove him from the United States. Dkt # 8.

7 **II. ARGUMENT**

8 A. THIS COURT HAS JURISDICTION OVER PETITIONER'S
9 CLAIMS

10 The bar to review at 8 U.S.C. § 1252(g) strips all courts of jurisdiction to
11 hear "any cause or claim by or on behalf of any alien arising from the decision or
12 action by the Attorney General to commence proceedings, adjudicate cases, or
13 execute removal orders against any alien under this chapter." The Supreme Court
14 previously characterized § 1252(g) as a narrow provision, applying "only to three
15 discrete actions that the Attorney General may take: her 'decision or action' to
16 'commence proceedings, adjudicate cases, or execute removal orders.'" *Reno v.*
17 *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999) (emphasis in
18 original). In doing so, the Supreme Court found it "implausible that the mention of
19 *three discrete events* along the road to deportation was a shorthand way to referring
20 to *all claims arising from* deportation proceedings." *Id.* (emphasis added).

21 Petitioners' challenge to his detention does not fall within these discrete actions.

22 There is no question that this Court has jurisdiction over his claim, as the
23 Supreme Court explicitly rejected the application of 8 U.S.C. § 1252(g) to a post-
24 final order custody habeas. *Zadvydas v. Davis*, 533 U.S. 678, 688, 121 S. Ct. 2491,
25 2497, 150 L. Ed. 2d 653 (2001) (discussing § 1252(g) and stating that "[t]he aliens
26 here, however, do not seek review of the Attorney General's exercise of discretion;
27 rather, they challenge the extent of the Attorney General's authority under the post-
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1 removal-period detention statute. And the extent of that authority is not a matter of
2 discretion.”). *See also Moussa v. Jenifer*, 389 F.3d 550, 554 (6th Cir. 2004)
3 (“citing *Zadvydas* and stating “Petitioner rightly argues that there are instances
4 where § 1252(g) does not suspend habeas review, such as in challenges to INS
5 authority to indefinitely detain a non-citizen following the execution of a removal
6 order.”).

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8 B. PETITIONER IS LIKELY TO PREVAIL ON HIS CLAIMS, OR, AT
9 A MINIMUM RAISES SERIOUS LEGAL QUESTIONS

10 Petitioner is likely to succeed on his claims or, at a minimum, meets the
11 threshold “serious questions” standard for an injunction to preserve the status
12 quo. *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).
13 Petitioner was already released twice because the government could not remove
14 him from the United States. The burden is now on the government, not Petitioner,
15 to show that conditions have changed such that his removal is reasonably
16 foreseeable. *Roble v. Bondi*, No. 25-CV-3196 (LMP/LIB), 2025 WL 2443453, at
17 *4 (D. Minn. Aug. 25, 2025) (“the regulations at issue in this case place the burden
18 on ICE to first establish changed circumstances that make removal significantly
19 likely in the reasonably foreseeable future”; *Hernandez Escalante v. Noem*, No.
20 9:25-cv-00182-MJT, 2025 WL 2206113, at *3 (E.D. Tex. Aug. 2, 2025) (“The[]
21 regulations clearly indicate, upon revocation of supervised release, it is [ICE's]
22 burden to show a significant likelihood that the [noncitizen] may be removed.”);
23 *Nguyen v. Hyde*, No. 25-cv-11470-MJJ, 2025 WL 1725791, at *3 n.2 (D. Mass.
24 June 20, 2025); *Escalante v. Noem*, No. 9:25-CV-00182-MJT, 2025 WL 2206113,
25 at *3 (E.D. Tex. Aug. 2, 2025) (“These regulations clearly indicate, upon
26 revocation of supervised release, it is the Service's burden to show a significant
27 likelihood that the alien may be removed.”). As the court stated in *Roble v. Bondi*,
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1 “[a]bsent specific statutory or regulatory language on the allocation of the burden
2 of proof (as is the case in 8 C.F.R. § 241.13(i)(2)), the Court is guided by the
3 ‘default rule’ that the burden falls on the party who ‘generally seeks to change the
4 present state of affairs and who therefore naturally should be expected to bear the
5 risk of failure of proof or persuasion.” *Hernandez Escalante v. Noem*, No. 9:25-cv-
6 00182-MJT, 2025 WL 2206113, at *3 citing *Schaffer ex rel. Schaffer v. Weast*, 546
7 U.S. 49, 56 (2005) (quoting McCormick on Evidence § 337 (5th ed. 1999)). Hence,
8 Respondents incorrectly place the burden on Petitioner to when the burden is on
9 them to establish that removal is reasonably foreseeable.

10 Petitioner does not argue that he is permitted to be indefinitely released from
11 custody, contrary to Respondents’ assertions. Dkt # 8 at 6. Respondent has been on
12 an order of supervision and has reported regularly without incident. If the
13 government is able to obtain travel documents then nothing prevents his removal
14 from the United States. The government has now tried twice, in 2004 and 2007, to
15 remove Petitioner. It cannot just keep re-detaining him on a political whim absent
16 evidence that another country is likely to accept him. “Imposing the burden of
17 proof on the alien each time he is re-detained would lead to an unjust result and
18 serious due process implications.” *Escalante v. Noem*, No. 9:25-CV-00182-MJT,
19 2025 WL 2206113, at *3 (E.D. Tex. Aug. 2, 2025).

20 Respondents state that they are not seeking Petitioner’s removal to a third
21 country, and are only seeking removal to Cambodia. Dkt # 8-1. Respondents state
22 that they are preparing a request to the Cambodian embassy in order to obtain a
23 travel document. Dkt # 8 at 8. But they don’t explain just what has *changed* since
24 they last attempted to remove Petitioner to Cambodia. They state that “ICE is able
25 to obtain travel documents from Cambodia and is also able to remove Cambodian
26 citizens to Cambodia.” Dkt # 8. But they don’t state that this is a change from 2004
27 and 2007 when they were not able to remove Petitioner. *Roble v. Bondi*, No. 25-
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1 CV-3196 (LMP/LIB), 2025 WL 2443453, at *5 (D. Minn. Aug. 25, 2025) (“Courts
2 faced with similarly paltry evidence of changed circumstances have likewise
3 concluded that the government failed to meet its burden under 8 C.F.R. §
4 241.13(i)(2).”); *Nguyen v. Hyde*, No. 25-CV-11470-MJJ, 2025 WL 1725791, at *4
5 (D. Mass. June 20, 2025) (“ICE does not identify what changed circumstance
6 occurred during the approximately five-year gap between issuance of the 2020
7 MOU and Petitioner's detention on May 21, 2025, that now make it significantly
8 likely Mr. Nguyen will be removed to Vietnam. Respondents do not even state how
9 and whether the 2020 MOU applies to Mr. Nguyen specifically.”)

10 Last, it appears that Petitioner may have been held cumulatively less than 6
11 months, but the record is unclear. Dkt # 8-1. However, *Zadvydas* applies
12 nevertheless, because the government has twice released Petitioner because it was
13 not able to remove him. As the court stated in *Nguyen v. Hyde*, “[t]his case is about
14 ICE's authority to *re-detain* Mr. Nguyen after he was issued a final order of
15 removal, detained, and subsequently released on an OSUP. The DHS regulation, 8
16 C.F.R. § 241.13(i), applies to non-citizens in Petitioner's situation.” Hence, the
17 Court must look to whether Respondents have demonstrated a change in
18 circumstances such that Petitioner’s removal is reasonably foreseeable. They have
19 not.

20 21 C. IRREPERABLE HARM HAS BEEN SHOWN

22 Contrary to Respondents’ assertions, Petitioner does not ask the Court to
23 issue an injunction solely on the basis of irreparable harm. Dkt # 8 at 9. Rather, in
24 order to obtain an injunction, a showing of irreparable harm is required. *Winter v.*
25 *Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 129 S. Ct. 365, 375, 172 L. Ed. 2d 249
26 (2008). Petitioner has met such a showing here, as circuit precedent establishes that
27 challenged detention meets the harm standard for an injunction. *Hernandez v.*
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1 *Sessions*, 872 F.3d 976, 995 (9th Cir. 2017). “Deprivation of physical liberty by
2 detention constitutes irreparable harm.” *Arevalo v. Hennessy*, 882 F.3d 763, 767
3 (9th Cir. 2018).

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5 D. THE BALANCE OF EQUITIES TIPS IN PETITIONER’S FAVOR

6 Respondents argue that “[t]he balancing of equities and the public interest
7 weigh heavily against granting Petitioner equitable relief” because Petitioner
8 cannot succeed on the merits. Dkt # 8 at 10. However, as discussed above, that is
9 not the case. It is Respondents who are unable to meet their burden in
10 demonstrating changed circumstances. Petitioner seeks an injunction to halt the
11 violation of federal laws, which makes the injunction in the public interest and the
12 balance of hardships tip in his favor. *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006,
13 1029 (9th Cir. 2013).

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16 **III. CONCLUSION**

17 For the foregoing reasons, the Court should grant Petitioner’s *Ex Parte*
18 Application for a Temporary Restraining Order and Order to Show Cause.

19 Dated: September 24, 2025

Respectfully Submitted,

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