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

MINH NHAT PHAN,

Petitioner,

v.

KRISTI NOEM, Secretary of the
Department of Homeland Security,
PAMELA JO BONDI, Attorney General,
TODD M. LYONS, Acting Director,
Immigration and Customs Enforcement,
JESUS ROCHA, Acting Field Office
Director, San Diego Field Office,
CHRISTOPHER LAROSE, Warden at
Otay Mesa Detention Center,

Respondents.

CIVIL CASE NO.: 25-cv-2422-RBM

**Traverse in
Support of
Petition for Writ of
Habeas Corpus**

INTRODUCTION

Having received the government's Return and supporting evidence, this Court should grant Mr. Phan's petition on all three claims. To do so, the Court need only follow recent decisions in this district and around the country.

First, this Court must grant the petition on Count 1 because the government does not claim to have complied with 8 C.F.R. §§ 241.4, 241.13. For persons like Mr. Phan, those regulations permit re-detention only if ICE (1) "determines that there is a significant likelihood that the alien may be removed in the reasonably foreseeable future," *id.* § 241.13(i)(2), (2) makes that finding "on account of changed circumstances," *id.*, (3) provides "an initial informal interview promptly," *id.* §§ 241.4(l)(1), 241.13(i)(3), and (4) "affords the [person] an opportunity to respond to the reasons for revocation," *id.* The government provides no evidence that ICE took any of those steps in the course of re-detaining Mr. Phan. Just last week, on a record meaningfully indistinguishable from this one, Judge Huie granted a habeas petition for failure to follow § 241.13(i). *Rokhfirooz v. Larose*, 2025 WL 2646165 (S.D. Cal. Sept. 15, 2025).

Second, this Court must grant the petition on Count 2 because the government provides no evidence to satisfy the success element ("a significant likelihood of removal") or timing element ("in the reasonably foreseeable future") of *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). Though Deportation Officer ("DO") Cole asserts that "ICE routinely obtains travel documents for Vietnamese citizens," Doc. 6-1 at ¶ 10, he does not say (1) whether any of those Vietnamese citizens entered pre-1995, thereby failing to address the entire premise of this petition, (2) what proportion of Vietnamese citizens for whom travel documents are sought actually receive them, or (3) whether Mr. Phan qualifies for removal at all under the 2020 Memorandum of Understanding ("MOU"). (The government does not dispute that he may not be removed under the 2008 treaty.) Nor does DO Cole give any indication of how long it takes to get travel documents for pre-1995

1 Vietnamese citizens—no statistics, no estimations, no anecdotes, no nothing. The
2 government instead relies on ICE’s plans to seek travel documents. But as Judge
3 Robinson ruled this week in granting a habeas petition, a travel document request
4 alone—with no evidence of likely success or timing—does not satisfy the
5 government’s burden under *Zadvydas. Rebenok v. Noem*, 25-cv-2171-TWR.¹

6 Third, the government does not dispute that ICE’s third-country removal
7 policy violates due process. And the Ninth Circuit has squarely rejected the
8 government’s jurisdictional argument, holding that § 1252(g) does not prohibit
9 immigrants from asserting a “right to meaningful notice and an opportunity to
10 present a fear-based claim before [they] [are] removed,” or any other claim
11 asserting a “violation of [ICE’s] mandatory duties.” *Ibarra-Perez v. United States*,
12 __ F.4th __, 2025 WL 2461663, at *7, *9 (9th Cir. Aug. 27, 2025). And Judge
13 Moskowitz recently issued a TRO prohibiting third-country removal, even though
14 the government claimed there—as here—that ICE had no current plans to remove
15 the petitioner to a third country. *Tran v. Noem*, 25-cv-02391-BTM, Dkt. No. 6. The
16 contrary position would leave immigrants without protection from ICE’s policy,
17 which allows for a change of plans with minimal or no notice.

18 This Court should therefore grant the petition—or at least a temporary
19 restraining order (“TRO”)—on all three grounds.

20 ARGUMENT

21 I. In light of the government’s response, Mr. Phan succeeds on the merits.

22 With the government’s response in hand, this Court need not speculate about
23 whether Mr. Phan may succeed on the merits. Because the government’s evidence
24

25 ¹ Judge Robinson ruled orally, but Mr. Phan has ordered the transcript and will
26 provide it upon receipt. In *Rebenok*, the government defended against the petition
27 on the ground that travel document requests were pending with Moldova and
28 Poland. Judge Robinson determined that, statutorily, the petitioner could not be
removed to any country other than Ukraine. But he also ruled that—despite the
pending travel document requests—the government had not proved that removal to
the third countries was significantly likely in the reasonably foreseeable future.

1 is plainly insufficient to justify Mr. Phan's detention, his petition should be granted
2 outright, or the Court should at least release him on a TRO pending further briefing.

3 **A. Count 1: As Judge Huie recently found when granting a habeas**
4 **petition in *Rokhfirooz*, ICE did not adhere to the regulations**
5 **governing re-detention.**

6 First, the government provides no evidence that ICE complied with 8 C.F.R.
7 §§ 241.4, 241.13. The government does not deny that these regulations apply to
8 Mr. Phan, that Mr. Phan may challenge them in this habeas case, or that failure to
9 comply with them is grounds for release. *See* Doc. 6 at 5-6. To the contrary, the
10 government agrees that Mr. Phan's release was revoked under 8 C.F.R.
11 § 241.4(l)(2)(iii) and 8 C.F.R. § 241.13(i)(2). Doc. 6 at 6. But the government says
12 that ICE complied with these regulations. *Id.* ICE did not.

13 Begin with 8 C.F.R. § 241.13(i)(2). That section provides that ICE may
14 "revoke an alien's release under this section and return the alien to custody if, on
15 account of changed circumstances, the Service determines that there is a significant
16 likelihood that the alien may be removed in the reasonably foreseeable future." 8
17 C.F.R. § 241.13(i)(2) (emphasis added). That "regulation require[s] (1) an
18 individualized determination (2) by ICE that, (3) based on changed circumstances,
19 (4) removal has become significantly likely in the reasonably foreseeable future."
20 *Kong v. United States*, 62 F.4th 608, 619–20 (1st Cir. 2023).

21 In *Rokhfirooz*, Judge Huie determined the fourth requirement was not met on
22 a record materially indistinguishable from this one. 2025 WL 2646165, at *3 (S.D.
23 Cal. Sept. 15, 2025). There, the government failed to produce "any documented
24 determination, made prior to Petitioner's arrest, that his release should be revoked."
25 *Id.* at *3. The only documentation was "an arrest warrant, issued on DHS Form I-
26 200, merely recit[ing] that there is probable cause to believe that Petitioner is
27 'removable from the United States,' that is, subject to removal, which would be
28 accurate whether or not Petitioner's release was revoked." *Id.*

1 That is exactly the same documentation the government has produced here:
2 The government provides no documented, pre-arrest determination that release
3 should be revoked, but only an arrest warrant stating that Mr. Phan is removable.
4 Doc. 6-2 at 8. The I-213 confirms that his arrest was premised entirely on his status
5 as a removable immigrant, not a determination that release should be revoked due
6 to changed circumstances making removal significantly likely. *Id.* at 4 (“[I]t was
7 determined that PHAN is not in possession of valid immigration documents
8 allowing him to legally enter or reside in the United States.”); *id.* at 5
9 (“DISPOSITION: PHAN is inadmissible into the United States . . .”).

10 Judge Huie also remarked in *Rokhfirooz* that the government had produced
11 “no record constitut[ing] a determination even after Petitioner’s arrest that there is
12 a significant likelihood that Petitioner can be removed in the reasonably foreseeable
13 future.” 2025 WL 2646165, at *3. “In connection with defending [that] lawsuit,
14 Respondents prepared and filed a declaration from a Supervisory Detention and
15 Deportation Officer assigned to the detention center where Petitioner is housed,”
16 which stated that “[ICE Enforcement and Removal Operations] determined that
17 there is a significant likelihood of removal and resettlement in a third country in the
18 reasonably foreseeable future and re-detained Petitioner to execute his warrant of
19 removal.” *Id.* Judge Huie deemed that post-hoc determination insufficient, because
20 the declarant did not produce underlying documentation showing that any such
21 determination had actually been made—let alone that it had been made pre-arrest.
22 *Id.* The Court therefore “decline[d] to rely on” those statements. *Id.*

23 Here, the evidence is even weaker. DO Cole does not even assert that there
24 is a significant likelihood of removing Mr. Phan in the reasonably foreseeable
25 future. *See* Doc. 6-1 at 1-2. There is therefore “no evidence that DHS has made
26 such a determination as to the revocation of Petitioner’s release even after the fact
27 of arrest, up to the present day.” *Rokhfirooz*, 2025 WL 2646165, at *4.

1 Additionally, even if ICE had revoked release because of a significant
2 likelihood of removal, that is not enough. The regulation requires that the likelihood
3 of removal arise out of “changed circumstances.” 8 C.F.R. § 241.13(i)(2). Here, the
4 same treaty and memorandum have applied to Mr. Phan’s removal for 17 and 5
5 years, respectively. Doc. 1 at 4-5. DO Cole identifies no changed circumstances,
6 nor does he assert that ICE premised re-detention on any such changes. And
7 “Respondents have not provided any details about why a travel document could not
8 be obtained in the past, nor have they attempted to show why obtaining a travel
9 document is more likely this time around.” *Hoac v. Becerra*, No. 2:25-CV-01740-
10 DC-JDP, 2025 WL 1993771, at *4 (E.D. Cal. July 16, 2025). Respondents have
11 announced only their “intent to eventually complete a travel document request for
12 Petitioner,” which “does not constitute a changed circumstance.” *Id.*

13 Finally, all of the above goes only to ICE’s violations of 8 C.F.R.
14 § 241.13(i)(2). Sections 241.4(l) and 241.13(i)(3) mandate additional procedures:
15 “[B]oth require ICE to provide ‘an initial informal interview promptly ... to afford
16 the alien an opportunity to respond to the reasons for revocation.’” *Rombot v. Souza*,
17 296 F. Supp. 3d 383, 387 (D. Mass. 2017) (quoting 8 C.F.R. §§ 241.4(l)(2),
18 241.13(i)(3)). Mr. Phan declared that he was not provided with this interview, Doc.
19 1 at 27, and DO Cole does not dispute that. That failure is yet another reason to
20 grant this petition. *See, e.g., Rombot*, 296 F. Supp. 3d at 386–89; *You v. Nielsen*,
21 321 F. Supp. 3d 451, 463–64 (S.D.N.Y. 2018); *Ceesay v. Kurzdorfer*, 781 F. Supp.
22 3d 137, 162–66 (W.D.N.Y. 2025).

23 In the end, the government does nothing to dispute all this, except to say that
24 Judge Keep’s order did not stay Mr. Nguyen’s removal. Doc. 6 at 7. But
25 Mr. Nguyen never claimed that Judge Keep’s order stayed removal—the order said
26 only that ICE was to release Mr. Nguyen pursuant to ICE regulations. Doc. 1 at 32.
27 As the above cases show, §§ 241.4 and 241.13 would apply even without a court
28

1 order. But their violation is particularly concerning given that the court ordered his
2 release consistent with one of the regulations (§ 241.4) relied on here.

3 On this ground alone, this Court must grant the petition.

4 **B. Count 2: The government has not proved that there is a significant**
5 **likelihood of removal in the reasonably foreseeable future.**

6 Second, the government provides no evidence that Mr. Phan will likely be
7 removed to Vietnam at all, let alone in the reasonably foreseeable future.

8 **1. The government cites no authority for the proposition that**
9 **Mr. Phan’s 3-plus years of detention do not satisfy the 6-month**
10 ***Zadvydas* grace period.**

11 As an initial matter, the government appears to contest that Mr. Phan’s 3-
12 plus years of detention in the late 1990s count toward the six-month *Zadvydas* grace
13 period—the government appears to contend that the six-month grace period starts
14 over every time ICE re-detains someone. Doc. 6 at 7-8. “Courts . . . broadly agree”
15 that this is not correct. *Diaz-Ortega v. Lund*, 2019 WL 6003485, at *7 n.6 (W.D.
16 La. Oct. 15, 2019), *report and recommendation adopted*, 2019 WL 6037220 (W.D.
17 La. Nov. 13, 2019); *see also Sied v. Nielsen*, No. 17-CV-06785-LB, 2018 WL
18 1876907, at *6 (N.D. Cal. Apr. 19, 2018) (collecting cases); *Nguyen v. Scott*, No.
19 2:25-CV-01398, 2025 WL 2419288, at *13 (W.D. Wash. Aug. 21, 2025).

20 None of the government’s cited cases support that view, either. Doc. 6 at 7-
21 9. Three involve petitioners who were *not* detained for a cumulative 6 months.
22 *Ghamelian v. Baker*, No. CV SAG-25-02106, 2025 WL 2049981, at *1 (D. Md.
23 July 22, 2025) (indicating in the statement of facts that petitioner was not detained
24 until 2025); *Guerra-Castro v. Parra*, No. 1:25-CV-22487, 2025 WL 1984300, at
25 *4 & n.5 (S.D. Fla. July 17, 2025) (“Even if the Court counted Petitioner’s previous
26 ICE detention, Petitioner’s cumulative amount of detention would not total 6
27 months.”); *Grigorian v. Bondi*, No. 25-CV-22914-RAR, 2025 WL 1895479, at *8
28 (S.D. Fla. July 8, 2025) (“[Petitioner] was not in ICE post-removal-period detention

1 until his detention on June 23, 2025.”). A fourth holds that detention *is* cumulative,
2 supporting Mr. Phan. *Nhean v. Brott*, No. CV 17-28 (PAM/FLN), 2017 WL
3 2437268, at *2 (D. Minn. May 2, 2017), *report and recommendation adopted*, No.
4 CV 17-28 (PAM/FLN), 2017 WL 2437246 (D. Minn. June 5, 2017).²

5 A fifth cited case contends that the statutorily-defined 90-day removal period
6 under 8 U.S.C. § 1231(a)(1)(B) starts over on re-detention. *Farah v. INS*, No. Civ.
7 02-4725(DSD/RLE), 2003 WL 221809, at *5 (D. Minn. Jan. 29, 2013). But even a
8 cursory review of § 1231(a)(1)(B) shows that that is not true. The statute defines
9 three, specific starting dates for the removal period, none of which involve re-
10 detention. *See Bailey v. Lynch*, No. CV 16-2600 (JLL), 2016 WL 5791407, at *2
11 (D.N.J. Oct. 3, 2016) (explaining this). The six-month grace period has therefore
12 ended, and so—contrary to the government’s claims—Mr. Phan need not “rebut[]
13 the presumptively reasonable period of detention.” Doc. 6 at 7.

14 **2. The government provides no evidence to support a “significant**
15 **likelihood of removal” to Vietnam.**

16 Because the six-month grace period has passed, this court moves on to the
17 burden-shifting framework. The government does not deny that Mr. Phan has
18 provided “good reason” to doubt his reasonably foreseeable removal, thereby
19 forfeiting the issue. *See Moallin v. Cangemi*, 427 F. Supp. 2d 908, 928 (D. Minn.
20 2006). The burden therefore shifts to the government to prove that there is a
21 “significant likelihood of removal in the reasonably foreseeable future.” *Zadvydas*,
22 533 U.S. at 701. That standard has a success element (“significant likelihood of
23 removal”) and a timing element (“in the reasonably foreseeable future”). The
24 government meets neither.

25
26 ² All of these courts were wrong to tie the *Zadvydas* period to the length of
27 detention, rather than the time since the removal order become final. *See, e.g.,*
28 *Zavvar v. Scott*, No. CV 25-2104-TDC, 2025 WL 2592543, at *4 (D. Md. Sept. 8,
2025) (collecting cases). But that does not matter in this case, because Mr. Phan
was detained for much more than 6 cumulative months.

1 As an initial matter, the government has not shown that Mr. Phan's removal
2 to Vietnam is "significant[ly] like[ly]." *Zadvydas*, 533 U.S. at 701.

3 *First*, DO Cole's assertion that "ICE routinely obtains travel documents for
4 Vietnamese citizens," Doc. 6-1 at ¶ 10, does not show that Mr. Phan's removal is
5 significantly likely, for several reasons. "More glaring[ly]," DO Cole "does not
6 identify how many of the . . . individuals" routinely removed "were *pre-1995*
7 *Vietnamese refugees*, like Mr. [Phan]." *Nguyen v. Hyde*, No. 25-CV-11470-MJJ,
8 2025 WL 1725791, at *4 (D. Mass. June 20, 2025); *accord Nguyen*, 2025 WL
9 2419288, at *17 (finding statistics insufficient when declarant "did not note how
10 many were pre-1995 arrivals"). As the petition showed without contradiction, pre-
11 1995 arrivals face unique removal challenges: They are exempted from the 2008
12 treaty entirely, and only some are eligible for removal under the 2020 Memorandum
13 of Understanding ("MOU"). Doc. 1 at 3-5. And statistics provided in the petition
14 show that the vast majority of ICE's travel document requests for pre-1995
15 Vietnamese immigrants have historically been denied, even under the MOU. *Id.* at
16 4-5. Without knowing whether DO Cole's statement encompasses these pre-1995
17 immigrants, his statement is not probative.

18 Furthermore, DO Cole's statement does not even suggest that a high
19 *proportion* of Vietnamese citizens are successfully removed when ICE seeks travel
20 documents. "[I]f the total number of requests that were made to Vietnam was
21 disclosed, [this Court] might be able to gauge how likely it is that Petitioner would
22 be removed to Vietnam. If DHS submitted 350 requests and Vietnam issued travel
23 documents for 328 individuals, Respondents may very well have shown that
24 removal is significantly likely in the reasonably foreseeable future. On the other
25 hand, if DHS submitted 3,500 requests and only 328 individuals received travel
26 documents, Respondents would not be able to meet their burden." *Nguyen*, 2025
27 WL 1725791, at *4; *accord Hoac*, 2025 WL 1993771, at *5. DO Cole provides no
28 numbers of any kind, precluding this kind of analysis.

1 Just as importantly, though DO Cole offers a generalization about
2 Vietnamese removals, courts have “demanded an individualized analysis” of why
3 *this* person—Mr. Phan—will likely be removed. *Nguyen*, 2025 WL 2419288, at
4 *17 (citing *Nguyen*, 2025 WL 1725791, at *4). This Court cannot know if Mr. Phan
5 qualifies at all under the MOU, because (1) the MOU applies only to persons
6 meeting certain criteria, but (2) the government has never disclosed in full what
7 those criteria are. *Id.* at *6. And even for those who qualify, the MOU provides only
8 that Vietnam has “discretion whether to issue a travel document,” which it exercises
9 “on a case-by-case basis.” *Hoac*, 2025 WL 1993771, at *5. By itself, then, “the
10 MOU has repeatedly been deemed insufficient to show a significant likelihood of
11 remova[l] in the reasonably foreseeable future.” *Nguyen*, 2025 WL 2419288, at
12 *17. Because “[t]he government has not provided any evidence of Vietnam’s
13 eligibility criteria or why it believes Petitioner now meets it,” the government’s
14 evidence is insufficient. *Id.* at *18.

15 *Second*, even if ICE had requested travel documents for Mr. Phan—and, to
16 date, it has not, Doc. 6-1 at ¶ 9—good faith efforts to secure a travel document do
17 not themselves satisfy *Zadvydas*. In fact, the petitioner in *Zadvydas* appealed a
18 “Fifth Circuit h[olding] [that] [the petitioner’s] continued detention [was] lawful as
19 long as good faith efforts to effectuate deportation continue and [the petitioner]
20 failed to show that deportation will prove impossible.” 533 U.S. at 702 (cleaned
21 up). The Supreme Court reversed, finding that the Fifth Circuit’s good-faith-efforts
22 standard “demand[ed] more than our reading of the statute can bear.” *Id.*

23 Thus, “under *Zadvydas*, the reasonableness of Petitioner’s detention does not
24 turn on the degree of the government’s good faith efforts. Indeed, the *Zadvydas*
25 court explicitly rejected such a standard. Rather, the reasonableness of Petitioner’s
26 detention turns on whether and to what extent the government’s efforts are likely to
27 bear fruit.” *Hassoun v. Sessions*, No. 18-CV-586-FPG, 2019 WL 78984, at *5
28 (W.D.N.Y. Jan. 2, 2019). Accordingly, “the Government is required to demonstrate

1 the likelihood of not only the *existence* of untapped possibilities, but also of a
2 probability of success in such possibilities.” *Elashi v. Sabol*, 714 F. Supp. 2d 502,
3 506 (M.D. Pa. 2010).

4 Here, then, “[w]hile the respondent asserts that [Mr. Phan’s] travel document
5 requests with [the Vietnamese] Consulate[]” will be lodged, “this is insufficient. It
6 is merely an assertion of good-faith efforts to secure removal; it does not make
7 removal likely in the reasonably foreseeable future.” *Gilali v. Warden of McHenry*
8 *Cnty.*, No. 19-CV-837, 2019 WL 5191251, at *5 (E.D. Wis. Oct. 15, 2019). Many
9 courts have agreed that requesting travel documents does not itself make removal
10 reasonably likely. *See, e.g., Andreasyan v. Gonzales*, 446 F. Supp. 2d 1186, 1189
11 (W.D. Wash. 2006) (holding evidence that the petitioner’s case was “still under
12 review and pending a decision” did not meet respondents’ burden); *Islam v. Kane*,
13 No. CV-11-515-PHX-PGR, 2011 WL 4374226, at *3 (D. Ariz. Aug. 30, 2011),
14 *report and recommendation adopted*, 2011 WL 4374205 (D. Ariz. Sept. 20, 2011)
15 (“Repeated statements from the Bangladesh Consulate that the travel document
16 request is pending does not provide any insight as to when, or if, that request will
17 be fulfilled.”); *Khader v. Holder*, 843 F. Supp. 2d 1202, 1208 (N.D. Ala. 2011)
18 (granting petition despite pending travel document request, where “[t]he
19 government offers nothing to suggest when an answer might be forthcoming or why
20 there is reason to believe that he will not be denied travel documents”); *Mohamed*
21 *v. Ashcroft*, No. C01-1747P, 2002 WL 32620339, at *1 (W.D. Wash. Apr. 15, 2002)
22 (granting petition despite pending travel document request). That includes Judge
23 Robinson just the week. *See supra*, Introduction (explaining the *Rebenok* ruling).

24 **3. The government provides no evidence to support that any such**
25 **removal will occur “in the reasonably foreseeable future.”**

26 Additionally, even if ICE will eventually remove Mr. Phan, the government
27 provides zero evidence that removal will happen “in the reasonably foreseeable
28 future.” *Zadvydas*, 533 U.S. at 701. DO Cole provides no timetable for how long

1 travel document requests like his typically take—no statistics, no estimations, no
2 anecdotes, no nothing.

3 That is fatal. “[D]etention may not be justified on the basis that removal to a
4 particular country is likely *at some point* in the future; *Zadvydas* permits continued
5 detention only insofar as removal is likely in the *reasonably foreseeable* future.”
6 *Hassoun*, 2019 WL 78984, at *6. “The government’s active efforts to obtain travel
7 documents from the Embassy are not enough to demonstrate a likelihood of
8 removal in the reasonably foreseeable future where the record before the Court
9 contains no information to suggest a timeline on which such documents will
10 actually be issued.” *Rual v. Barr*, No. 6:20-CV-06215 EAW, 2020 WL 3972319,
11 at *4 (W.D.N.Y. July 14, 2020). “[I]f DHS has no idea of when it might reasonably
12 expect [Mr. Phan] to be repatriated, this Court certainly cannot conclude that his
13 removal is likely to occur—or even that it *might* occur—in the reasonably
14 foreseeable future.” *Singh v. Whitaker*, 362 F. Supp. 3d 93, 102 (W.D.N.Y. 2019).

15 Courts have routinely granted habeas petitions where, as here, the
16 government does not establish *Zadvydas*’s timing element. *See, e.g., Balza v. Barr*,
17 No. 6:20-CV-00866, 2020 WL 6143643, at *5 (W.D. La. Sept. 17, 2020), *report*
18 *and recommendation adopted*, No. 6:20-CV-00866, 2020 WL 6064881 (W.D. La.
19 Oct. 14, 2020) (“[A] theoretical possibility of eventually being removed does not
20 satisfy the government’s burden[.]”); *Eugene v. Holder*, No. 408CV346-RH WCS,
21 2009 WL 931155, at *4 (N.D. Fla. Apr. 2, 2009) (“While Respondents contend
22 Petitioner *could* be removed to Haiti, it has not been shown that it is significantly
23 likely that Petitioner *will* be removed in the *reasonably foreseeable* future.”);
24 *Abdel-Muhti v. Ashcroft*, 314 F. Supp. 2d 418, 426 (M.D. Pa. 2004) (granting
25 petition because even if “Petitioner’s removal will ultimately be effected . . . the
26 Government has not rebutted the presumption that removal is not likely to occur in
27 the reasonably foreseeable future”); *Seretse-Khama v. Ashcroft*, 215 F. Supp. 2d
28 37, 50 (D.D.C. 2002) (granting petition where the government had not provided

1 any “evidence . . . that travel documents will be issued in a matter of days or weeks
2 or even months”).

3 In sum, then, there could be “some possibility that Vietnam will accept
4 Petitioner at some point. But that is not the same as a significant likelihood that he
5 will be accepted in the reasonably foreseeable future.” *Nguyen*, 2025 WL 2419288,
6 at *16. Mr. Phan therefore succeeds under *Zadvydas*, too.

7 **C. Count 3: The government does not deny that ICE’s third-country**
8 **removal policy violates due process, and this claim is justiciable.**

9 This Court should also prohibit ICE from removing Mr. Phan to a third
10 country without adequate notice. The government does not try to defend ICE’s
11 third-country removal policy on the merits. Instead, the government says that a
12 third-country removal challenge is nonjusticiable under Article III because ICE
13 professes no current plans to remove Mr. Phan to a third country. Doc. 6 at 1–2.

14 But “[t]here, so to speak, lies the rub.” *D.V.D. v. U.S. Dep’t of Homeland*
15 *Sec.*, 778 F. Supp. 3d 355, 389 n.44 (D. Mass. 2025). “[A]ccording to
16 [Respondents], an individual must await notice of removal before his claim is
17 ripe[.]” *Id.* But under ICE’s policy, “there is no notice” for certain removals and
18 inadequate notice for others. *Id.* And if Mr. Phan “is removed” before he can raise
19 this challenge, Respondents will then argue that “there is no jurisdiction” to bring
20 him back to the United States. *Id.*

21 This Court need not adopt that Kafkaesque view. The government has not
22 denied that “the default procedural structure without an injunction” is “set forth in
23 DHS’s March 30 and July 9, 2025 policy memoranda,” which provide for third-
24 country removal with little or no notice. *Y.T.D. v. Andrews*, No. 1:25-CV-01100
25 JLT SKO, 2025 WL 2675760, at *5 (E.D. Cal. Sept. 18, 2025). And Mr. Phan has
26 “point[ed] to numerous examples of cases involving individuals who DHS has
27 attempted to remove to third countries with little or no notice or opportunity to be
28 heard.” *Id.*; see Doc. 1 at 15–17. “On balance,” then, “there is a sufficiently

1 imminent risk that [Mr. Phan] will be subjected to improper process in relation to
2 any third country removal to warrant imposition of an injunction requiring
3 additional process.” *Y.T.D.*, 2025 WL 2675760, at *11.

4 **D. Section 1252(g) does not deprive this Court of jurisdiction.**

5 Finally, this Court has jurisdiction. Contrary to the government’s arguments,
6 § 1252(g) does not bar review of “all claims arising from deportation proceedings.”
7 *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999). Instead,
8 courts “have jurisdiction to decide a purely legal question that does not challenge
9 the Attorney General’s discretionary authority.” *Ibarra-Perez v. United States*, __
10 F.4th __, 2025 WL 2461663, at *6 (9th Cir. Aug. 27, 2025) (cleaned up).

11 In *Ibarra-Perez*, the Ninth Circuit squarely held that § 1252(g) does not
12 prohibit immigrants from asserting a “right to meaningful notice and an opportunity
13 to present a fear-based claim before [they] [are] removed,” *id.* at *7³—the same
14 claim that Mr. Phan raises here with respect to third-country removals. The Court
15 reasoned that “§ 1252(g) does not prohibit challenges to unlawful practices merely
16 because they are in some fashion connected to removal orders.” *Id.* Instead, 1252(g)
17 is “limited . . . to actions challenging the Attorney General’s discretionary decisions
18 to initiate proceedings, adjudicate cases, and execute removal orders.” *Arce v.*
19 *United States*, 899 F.3d 796, 800 (9th Cir. 2018). It does not apply to arguments
20 that the government “entirely lacked the authority, and therefore the discretion,” to
21 carry out a particular action. *Id.* at 800. Thus, § 1252(g) applies to “discretionary
22 decisions that [the Secretary] actually has the power to make, as compared to the
23 violation of his mandatory duties.” *Ibarra-Perez*, 2025 WL 2461663, at *9.

24
25
26 ³ Mr. Ibarra-Perez raised this claim in a post-removal Federal Tort Claims Act
27 (“FTCA”) case, *id.* at *2, while this is a pre-removal habeas petition. But the
28 analysis under § 1252(g) remains the same, because both Mr. Ibarra-Perez and
Mr. Phan are challenging the same kind of agency action. *See Kong*, 62 F.4th at
616–17 (explaining that a decision about § 1252(g) in an FTCA case would also
affect habeas jurisdiction).

The same logic applies to all of Mr. Phan's claims, because he challenges only violations of ICE's mandatory duties under statutes, regulations, and the Constitution. Accordingly, "[t]hough 8 U.S.C § 1252(g), precludes this Court from exercising jurisdiction over the executive's decision to 'commence proceedings, adjudicate cases, or execute removal orders against any alien,' this Court has habeas jurisdiction over the issues raised here, namely the lawfulness of [Mr. Phan's] continued detention and the process required in relation to third country removal." *Y.T.D.*, 2025 WL 2675760, at *5. Many courts agree. *See, e.g., Kong*, 62 F.4th at 617 ("§ 1252(g) does not bar judicial review of Kong's challenge to the lawfulness of his detention," including ICE's "fail[ure] to abide by its own regulations"); *Cardoso v. Reno*, 216 F.3d 512, 516 (5th Cir. 2000) ("[S]ection 1252(g) does not bar courts from reviewing an alien detention order[.]"); *Parra v. Perryman*, 172 F.3d 954, 957 (7th Cir. 1999) (1252(g) did not apply to a "claim concern[ing] detention"); *J.R. v. Bostock*, No. 2:25-CV-01161-JNW, 2025 WL 1810210, at *3 (W.D. Wash. June 30, 2025) (1252(g) did not apply to claims that ICE was "failing to carry out non-discretionary statutory duties and provide due process"); *D.V.D. v. U.S. Dep't of Homeland Sec.*, 778 F. Supp. 3d 355, 377–78 (D. Mass. 2025) (1252(g) did not bar review of "the purely legal question of whether the Constitution and relevant statutes require notice and an opportunity to be heard prior to removal of an alien to a third country").⁴

II. The remaining TRO factors decidedly favor Mr. Phan.

This Court need not evaluate the other TRO factors—the Court may simply grant the petition outright. But if the Court does decide to evaluate irreparable harm and balance of harms/public interest, Mr. Phan should prevail.

On the irreparable harm prong, "[i]t is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres*

⁴ Mr. Phan asserts no conditions-of-confinement claims, so the government's arguments on Doc. 6 at 3-4 are irrelevant.

1 *v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). And contrary to the government’s
2 arguments,⁵ the Ninth Circuit has specifically recognized the “irreparable harms
3 imposed on anyone subject to immigration detention.” *Hernandez v. Sessions*, 872
4 F.3d 976, 995 (9th Cir. 2017). Furthermore, “[i]t is beyond dispute that Petitioner
5 would face irreparable harm from removal to a third country.” *Nguyen*, 2025 WL
6 2419288, at *26.

7 On the balance-of-equities/public-interest prong, the government is correct
8 that there is a “public interest in prompt execution of removal orders.” *Nken v.*
9 *Holder*, 556 U.S. 418, 436 (2009). But that interest is diminished here because the
10 government likely cannot remove Mr. Phan in the reasonably foreseeable future,
11 and even if it could, it is equally “well-established that ‘our system does not permit
12 agencies to act unlawfully even in pursuit of desirable ends.’” *Nguyen*, 2025 WL
13 2419288, at *28 (quoting *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*,
14 594 U.S. 758, 766 (2021)). It also “would not be equitable or in the public’s interest
15 to allow the [government] to violate the requirements of federal law” with respect
16 to detention and re-detention, *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053,
17 1069 (9th Cir. 2014) (cleaned up), or to imperil the “public interest in preventing
18 aliens from being wrongfully removed,” *Nken*, 556 U.S. 418, 436.

19 Conclusion

20 For all these reasons, this Court should grant the petition, or at least enter a
21 temporary restraining order. In either case, the Court should (1) order Mr. Phan’s
22 immediate release, and (2) prohibit the government from removing Mr. Phan to a
23

24 ⁵ The government cites two cases to support the position that illegal immigration
25 detention is not irreparable harm. Doc. 6 at 8-9. But both cases involved immigrants
26 who (1) had already received a bond hearing and (2) were actively appealing to the
27 BIA, but (3) wanted a federal court to intervene before the appeal was done. *Reyes*
28 *v. Wolf*, No. C20-0377JLR, 2021 WL 662659, at *1 (W.D. Wash. Feb. 19, 2021),
and *Lopez Reyes v. Bonnar*, No. 18-CV-07429-SK, 2018 WL 7474861, at *1-5
(N.D. Cal. Dec. 24, 2018). These courts indicated only that post-bond-hearing
detention pending an ordinary BIA appeal was not irreparable harm. *Reyes*, 2021
WL 662659, at *3; *Lopez Reyes*, 2018 WL 7474861, at *10.

1 third country without following the process laid out in *D.V.D. v. U.S. Dep't of*
2 *Homeland Sec.*, No. CV 25-10676-BEM, 2025 WL 1453640, at *1 (D. Mass.
3 May 21, 2025).

4
5 Respectfully submitted,

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