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Phong PHAN

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

Phong PHAN,

Petitioner-Plaintiff,

v.

Moises BECERRA, Acting Field Office Director of Sacramento Office of Detention and Removal, U.S. Immigrations and Customs Enforcement; U.S. Department of Homeland Security;

Caleb VITELLO, Acting Director, Immigration and Customs Enforcement, U.S. Department of Homeland Security;

Kristi NOEM, in her Official Capacity, Secretary, U.S. Department of Homeland Security; and

Pam BONDI, in her Official Capacity, Attorney General of the United States;

Tonya ANDREWS, in her Official Capacity, Facility Administrator at Golden State Annex, McFarland, California;

Defendants.

Case No. 2:25-cv-01757-DC-JDP

PETITIONER-PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER

Challenge to Unlawful Incarceration; Request for Declaratory and Injunctive Relief

Judge: Hon. Dena Coggins
Hearing Date: June 30, 2025
Hearing Time: 2:00 p.m.

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I. INTRODUCTION

Petitioner Phong Phan is now being detained by Respondents in conditions that are very likely to be indefinite, and thus unconstitutional, absent action by this Court. The U.S. government has a political position that involves hoping it can remove Mr. Phan to his native Vietnam, but that requires the agreement of the government of Vietnam, as the United States cannot remove him to Vietnam unilaterally. A hope or desire is not enough to be a reality, and for that reason his continued detention must be enjoined by this Court.

Mr. Phan has a final order of removal to Vietnam, and no other country. He thus could be removed to Vietnam lawfully if the government of Vietnam were to indicate their willingness to accept him by issuing a travel document. However, again, there is no evidence that this will be a reality or that Respondents have even requested a travel document for him. An existing repatriation treaty—that Vietnam continues to observe—states that Vietnamese refugees like Mr. Phan, who came to the U.S. before 1995, will not be accepted for repatriation by Vietnam. The United States apparently attempted to modify that agreement back in 2020, but there is zero evidence that Vietnam ever changed its behavior to deviate from the clear terms of the treaty. In 2021, Respondents recognized that further detention of Mr. Phan would be indefinite and thus released him from custody.

Now the administration seems to think its change in desire means there is an actual change in Mr. Phan's circumstances. In fact, nothing has changed as a practical matter. No new treaty exists. No evidence of a change in the treaty since 2021 exists. No evidence of a change in practice by the government of Vietnam exists. No evidence of any dangerousness by Mr. Phan exists—he was already found not dangerous by the California Board of Parole Hearings and the Governor of California when he was released from prison in 2021. And no evidence that he might be a flight risk exists as he has been reporting to ICE regularly since his release from custody. He also maintains steady employment with Urban Alchemy, a nonprofit providing services to unhoused and other people in need in San Francisco's tenderloin neighborhood. His presence in the community is thus a net positive.

Whether the government will try an end-run around the lack of ability to remove him to Vietnam by trying to remove him to an undisclosed third country is unknown at this time. The Court should continue to order that such removal be enjoined because there is no existing system to provide him adequate notice of such removal, or the opportunity for him to request the legally required protection from torture or death that he might face in such third countries.

Under these circumstances, his arbitrary re-detention for no reason is unconstitutional. Moreover, even if there were to be a change in circumstances, due process still requires that he be given a hearing before his deprivation of rights. None of that occurred.

II. ARGUMENT

a. Ordering Mr. Phan's Release from Custody Pursuant to a TRO Would Maintain the Status Quo.

As an initial matter, the Court should reject Respondents' assertion that Mr. Phan's motion seeks to alter the status quo, because such an assertion is squarely at odds with Ninth Circuit law. *See* Dkt. 11, Respondents' Opposition ("Opp.") at 1, 3-4. In this case, a TRO granting Mr. Phan's release (on supervision) would merely restore him to the uncontested status that he held prior to his re-detention by Respondents on June 3, 2025.

In the Ninth Circuit, "[t]he status quo ante litem refers not simply to any situation before the filing of a lawsuit, but instead to the last uncontested status which preceded the pending controversy." *GoTo.com, Inc. v. Walt Disney, Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000) (emphasis added); *see also Al Otro Lado v. Wolf*, 497 F. Supp. 3d 914, 925 (S.D. Cal. 2020) (holding same, collecting cases in immigration context). In Mr. Phan's case, the status quo—the last uncontested status preceding the current controversy—was him living at liberty on supervised release, and exercising his right to freedom from unlawful restraint. This status quo existed for nearly four years (47 months). Again, returning him to this status would not give Mr. Phan any benefit or status that he did not otherwise already have, but rather it would maintain the status quo of the position he was in *prior to* Respondents' unlawful action—which is the correct point of measurement. *See GoTo.com, Inc.*, 202 F.3d at 1210.

According to Respondents, however, the moment they unlawfully re-detained Mr. Phan without any notice or process on June 3, that status quo was fundamentally altered. Opp. at 3-4. Under Respondents' incorrect interpretation of the law, even if Mr. Phan clearly establishes that he is likely to succeed on his claim that his re-detention was unconstitutional and that his unlawful detention imposes irreparable harm each day, the Court should deny expedited, temporary relief simply because the arrest already happened. As the Ninth Circuit explained in *GoTo.com, Inc.*, accepting Respondents' position "would lead to absurd situations, in which plaintiffs could never bring suit once infringing conduct had [already] begun." 202 F.3d at 1210.

This Court therefore can, and should, restore the status quo by ordering Mr. Phan's immediate release from custody on supervision, unless and until the government is able to show that his re-detention is not unconstitutionally indefinite and he is otherwise afforded a pre-deprivation due process hearing where ICE established that his re-detention is justified.[1]

b. Outright Release is the Most Appropriate Remedy in Mr. Phan's Circumstances.[2]

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[1] Respondents claim that Mr. Phan's request for a TRO is "substantially similar" to that in *Keo v. Warden of Mesa Verde Ice Processing Center*, Slip Op., 2024 WL 3970514 (E.D. Cal. August 28, 2024). Opp. at 1, 6 This is incorrect. In *Keo*, the court highlighted that the petitioner's motion for a TRO contained "no argument or facts" beyond stating the length of his detention, *id.* at *1, and that the motion was procedurally deficient on at least four counts, *id.* at *2. As such, the court wrote that "[b]ased on the procedural infirmities alone the Court may deny the Motion." *Id.* (citation omitted). Unlike in *Keo*, Mr. Phan has explained in great detail why he will suffer immediate and irreparable injury, loss, or damage if a TRO is not issued, certified in writing his efforts to provide notice to Respondents, and complied with both federal and local rules for seeking a TRO. *Keo* is therefore inapposite.

[2] Contrary to Respondents' assertion, this Court has authority to issue a stay of removal pursuant to *Nken v. Holder*, 556 U.S. 418 (2009) and the Court's inherent authority to issue orders maintaining the status quo. *See Virginian Ry. Co. v. United States*, 272 U.S. 658, 669 (1926) (noting that the power to issue a "stay" "to preserve the *status quo* pending an appeal" is "an incident" of the power "to enjoin" an administrative order). Moreover, a stay of removal is also appropriate to maintain the status quo to the extent that Respondents may attempt to remove Mr. Phan to a third country other than Vietnam without providing him sufficient notice and an opportunity to seek protection from threats to his life and safety in that country, as required by law. At no time have Respondents disclaimed this possibility, and this possibility seems

"Once invoked, the scope of a district court's equitable powers . . . is broad, for breadth and flexibility are inherent in equitable remedies." *Brown v. Plata*, 563 U.S. 493, 538 (2011) (quotations omitted). District courts may order "relief that the Constitution would not of its own force initially require if such relief is necessary to remedy a constitutional violation." *Toussaint v. McCarthy*, 801 F.2d 1080, 1087 (9th Cir.1986); *see also Sharp v. Weston*, 233 F.3d 1166, 1173 (9th Cir. 2000) (noting district courts' "broad powers to fashion a remedy" in affirming prison medical care injunction). The provisional remedies Mr. Phan proposes are comfortably within the range endorsed by courts in this Circuit and around the country.

Courts have long exercised their authority to remedy constitutional violations by ordering people released from unconstitutional conditions. *See Brown v. Plata*, 563 U.S. 493, 499 (2011) (affirming remedial order in § 1983 action that "required [the State] to release some number of prisoners before their full sentences have been served"); *Brenneman v. Madigan*, 343 F. Supp. 128, 139 (N.D. Cal. 1972) ("If the state cannot obtain the resources to detain persons . . . in accordance with minimum constitutional standards, then the state simply will not be permitted to detain such persons."). Courts regularly order the immediate release of individuals who have been unlawfully detained in violation of due process. In analogous circumstances to those of Mr. Phan, the Ninth Circuit in *Johnson v. Williford* affirmed the district court's order of immediate release pending action on an individual's habeas petition when the petitioner was (in that case, erroneously) released on parole, lived at liberty for 15 months, and then was rearrested in violation of due process. 682 F.2d 868, 869 (9th Cir. 1982). Applying the *Johnson* court's reasoning to Mr. Phan—whose interest in remaining free from unlawful physical confinement grew for nearly four years before he was re-detained without notice and hearing—leads to the inarguable conclusion that he must be immediately released from custody.

Even more similarly, in *Nak Kim Chhoeun v. Marin*, the court ordered the immediate release of individuals with final orders of removal who had been unlawfully detained without

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exceedingly likely for Mr. Phan, where it appears Respondents have not even requested a Vietnamese travel document for him.

notice and process after living in the United States for years in compliance with Orders of Supervision. *See* No. SACV 17–01898–CJC, 2018 WL 1941756, at *6 (C.D. Cal. Mar. 26, 2018). This is exactly the situation of Mr. Phan. *See also Mahmood v. Nielsen*, 312 F. Supp. 3d 417, 425 (S.D.N.Y. 2018) (ordering immediate release for noncitizen detained without notice and process); *Rombot v. Souza*, 296 F. Supp. 3d 383, 389 (D. Mass. 2017) (granted immediate release of noncitizen who was rearrested without violating conditions of release). District courts throughout the country applied similar reasoning during the COVID-19 pandemic to order outright release from custody. *See, e.g., Singh v. Barr*, No. 20-cv-02346-VKD, 2020 WL 2512410, at *10 (N.D. Cal. May 15, 2020).

A decision to order Mr. Phan's outright release, rather than subject him to continued detention that appears indefinite, is well within the norm, and well within this Court's authority.

c. Mr. Phan Meets the Standard to Warrant a TRO.

Mr. Phan has established his entitlement to a TRO by clearly demonstrating: (1) a likelihood of success on the merits; (2) that it is likely he will suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his favor; and (4) that injunctive relief is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). Moreover, at a minimum, Mr. Phan establishes the alternative standard—that he raises "serious questions" as to the merits of his claims, the balance of hardships tip "sharply" in his favor, and the remaining equitable factors are satisfied. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011).

Moreover, even if the Court found that Mr. Phan, through some or all of the terms of the TRO, were seeking a mandatory injunction, that standard would be met here. *Hernandez v. Sessions*, 872 F.3d 976, 998–99 (9th Cir., 2017). An alleged violation of Mr. Phan's due process rights and his risk of unlawful detention in violation of those rights constitutes extreme or very serious damage that will result in the absence of an injunction.

i. Mr. Phan has established a likelihood of success on the merits.

1. Mr. Phan's re-detention is unconstitutionally indefinite.

Contrary to Defendants' claim, Mr. Phan's re-detention is unconstitutionally indefinite by virtue of the still-existing and binding repatriation agreement between the U.S. government and the government of Vietnam, and Respondents have not provided any evidence—apart from the mere statement that there is an "updated executive branch assessment indicating likelihood of removal," *Opp.* at 4—that Mr. Phan's detention is reasonably foreseeable.

Under clear Supreme Court precedent, post-final order detention is only authorized for a "period reasonably necessary to secure removal," a period that the Court has determined to be presumptively six months. *Zadvydas v. Davis*, 533 U.S. 678, 699-701 (2001). That said, detainees are entitled to release even before six months of detention, as long as removal is not reasonably foreseeable. *See* 8 C.F.R. § 241.13(b)(1) (authorizing release after 90 days where removal not reasonably foreseeable). Moreover, as the period of post-final-order detention grows, what counts as "reasonably foreseeable" must conversely shrink. *Zadvydas* at 701. Here, Mr. Phan already previously served approximately 90 days in ICE detention 2021, which is when his post-final order detention clock began to run. 8 C.F.R. § 241.4(g)(1)(i). To find otherwise would lead to an absurd result: the government could detain individuals for a period of 90 days to 180 days upon the assertion that removal is reasonably foreseeable, release them for one day, then re-detain them the following day in order to restart the clock. This merry-go-round model of detention and release is not contemplated by the controlling statute and regulations, nor is it authorized by the Supreme Court's *Zadvydas* decision or principles of due process. Thus, in Mr. Phan's case, nearly four years have passed since his post-final order detention clock began to run—far more than the presumptive six months—and in that long 47-month period still no travel document has become available (and, perhaps has never been requested) and no change to the repatriation agreement has occurred, and thus his removal is not reasonably foreseeable.

Further, the United States and Vietnam have a binding and longstanding international agreement not to remove Vietnamese individuals who entered the United States before July 12,

1995.[3] There is no evidence that this agreement has been abrogated and there is no evidence that the government of Vietnam would fail to abide by its terms, or has done so in any significant way. Mr. Phan's removal is thus not reasonably foreseeable in this case, and Respondents have not provided evidence to actually rebut this. Respondents have not stated whether a travel document has *ever* been requested for Mr. Phan, have not provided an actual copy of any travel document request made for Mr. Phan, and have not provided any actual evidence as to whether or when that travel document might be issued, if ever. In fact, the Declaration of Deportation Officer Armando Meneses Jr. ("Meneses Decl.") submitted with Respondents' opposition is completely silent as to this point, and therefore only serves to undermine Respondents' assertion that Mr. Phan's removal is reasonably foreseeable. *See* Opp., Meneses Decl. The declaration does not describe whether a travel document has ever been issued for Mr. Phan, and does not provide any assurance as to whether a travel document will *ever* be issued. *Id.* Instead, the declaration summarily states that "ERO's Headquarters Alternative to Detention (ATD) program identified PHAN as an executable Final Order of removal." *Id.* However, given the lack of change in the state of the law or the policy of the Vietnamese government since then, there is no evidence that Mr. Phan's removal order is actually executable. This is the essence of the indefinite (and hence unconstitutional) nature of Mr. Phan's detention.

Finally, Respondents cite to *Trinh v. Homan*, 466 F. Supp. 3d 1077, 1090 (C.D. Cal. 2020) to support its claim that Mr. Phan's removal is possible, despite the still-binding repatriation agreement in place. Opp. at 5, n.4. However, again this case undermines Respondent's claims, as Respondents failed to mention that this case only further supports that the removal of pre-1995 arrivals to the United States from Vietnam is exceedingly unlikely. Indeed, the government conceded there that Vietnam only "issues travels documents in a small, but non-negligible portion of cases." *Id.* at 1090. This is because:

> On August 6, 2018, ICE met with Vietnamese officials again to continue discussions about the status of pre-1995 Vietnamese immigrants. (Dkt. 67-1 [Declaration of Michael V. Bernacke, hereinafter "Bernacke Decl."] ¶ 2.) After

[3] *Id.*

> that meeting, ICE reversed its position again. ICE conceded that, despite Vietnam's verbal commitment to consider travel document requests for pre-1995 immigrants, in general, the removal of these individuals was still not significantly likely. (Resp. Statement ¶ 12.) In October 2018, ICE instructed field offices to resume the practice of releasing pre-1995 Vietnamese immigrants within 90 days of a final order of removal. (Dkt. 119-2 [Declaration of Tuan V. Uong, hereinafter "Uong Decl."] at Ex. F; Schultz Dep. at 178:9-22.) That policy remains in place today. (Resp. Statement ¶ 12.)

Id. at 1084. Whether or not the U.S. government would like there to be a change, the fact remains that there is still no evidence of any actual change in the attitude or actions of the government of Vietnam (and certainly nothing since Mr. Phan's 2021 release) regarding the issuance of travel documents to pre-1995 arrivals from Vietnam.

Thus, Mr. Phan's removal to Vietnam continues to be unconstitutionally indefinite because it is not reasonably foreseeable, and Respondents have not provided any evidence to show otherwise.

2. Mr. Phan was not afforded a constitutionally-compliant process prior to his re-detention.[4]

Mr. Phan likewise demonstrates that the process (or lack thereof) of his re-detention was unconstitutional, as he was not provided with notice or an opportunity to be heard prior to his re-detention. ICE has the regulatory authority to re-detain a noncitizen previously ordered removed *only in specific circumstances*, including where an individual violates any condition of release or, as Respondents' note, where there are changed circumstances warranting re-detention. 8 U.S.C. § 1231; 8 C.F.R. § 241.4(l)(1)-(2); 8 C.F.R. § 241.13(i). However, none of the circumstances warranting re-detention are present here.

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[4] Respondents note several times that Mr. Phan was subject to mandatory detention during the pendency of his removal proceedings. Opp. at 2. That point is irrelevant here, as those removal proceedings concluded in 2021 when he became subject to the final order of removal. Today, Mr. Phan is no longer in removal proceedings and is therefore not subject to that same detention regime or its mandatory detention provision. After the removal proceedings conclude comes the removal period (90 days of required detention while removal is attempted). With the conclusion of the removal period, and the inability to remove him from the United States, Mr. Phan is in the post-removal period, when release is not only possible, but required by the Supreme Court once that detention is essentially indefinite. This is made clear by the regulations and by the fact that Mr. Phan was already previously released from detention after approximately 90 days (the removal period) in accordance with those post-removal regulations. 8 C.F.R. § 241.4(g)(1)(ii).

First, while Respondents argue that changed circumstances—here, apparently nothing more than the government's finding that his removal order is "executable" without any indication of whether there is a travel document for Mr. Phan—warrant Mr. Phan's re-detention, there is no indication in the record that Respondents even properly followed the regulatory procedures to re-detain Mr. Phan based on changed circumstances. The regulations at 8 C.F.R. § 241.13(i) requires that Mr. Phan have been notified of the reason for the revocation of his release, and provided with an interview at which he has an opportunity to respond to the reasons given for revocation and submit evidence and information on his behalf, including to show that "there is no significant likelihood he [will] be removed in the reasonably foreseeable future, or that he…has not violated the order of supervision." *Id.* Here, Mr. Phan was not given adequate notice as to the reason for revocation of his release, and he was instead merely told it was because he has an arrest warrant, Dkt. 1 at ¶¶ 5, 31. Such a warrant must have existed since he was released from state incarceration in 2021, even if another has been issued. Meneses Decl. Moreover, there is no indication that he has been provided an informal interview promptly after his return to custody at which he was able to provide evidence or information showing there is no significant likelihood that he will be removed in the reasonably foreseeable future. *See* Meneses Decl. (which is silent on whether Respondents have followed the revocation procedures).

Second, the broad statement that he has "as an executable Final Order of removal," without any indication of whether there is a travel document to actually facilitate his removal, does not constitute changed circumstances in the form of "a significant likelihood that the [noncitizen] may be removed in the reasonably foreseeable future" warranting re-detention under 8 C.F.R. § 241.13(i)(2). This is especially so where, as here, there is no indication of whether Respondents *ever* requested a travel document for Mr. Phan. Meneses Decl. Here, it appears that there are no actual changed

circumstances in Mr. Phan's case, and that the circumstances remain the same as they have for the past nearly four years while Mr. Phan has been out of custody: there is no travel document and no assurance that one will ever be issued. *See id.*

Third, ICE's regulatory authority to unilaterally re-detain Mr. Phan is proscribed by the Due Process Clause because it is well-established that individuals released from incarceration have a liberty interest in their freedom. In turn, to protect that interest, on the particular facts of Mr. Phan's case, due process required notice and a hearing, *prior to any re-arrest*, at which he was afforded the opportunity to advance his arguments as to why he should not be re-detained.

Even if the detention were to meet the *Zadvydas* standard for reasonable foreseeability, detention would still violate the Due Process Clause unless it were "reasonably related" to the government's purpose, which is to prevent danger or flight risk. The government's own regulations contemplate this requirement. *See* 8 C.F.R. § 241.13(g)(2) (providing that where removal is reasonably foreseeable, "detention will continue to be governed under the established standards" in 8 C.F.R. § 241.4); *see also Zadvydas*, 533 U.S. at 700 ("[I]f removal is reasonably foreseeable, the habeas court should consider the risk of the alien's committing further crimes as a factor potentially justifying confinement within that reasonable removal period") (emphasis added); *Id.* at 699 (purpose of detention is "assuring the alien's presence at the moment of removal"); *Id.* at 690-91 (discussing twin justifications of detention as preventing flight and protecting the community).

Thus, Mr. Phan must be released from custody because he does not pose a danger or flight risk that warrants post-final-order detention, regardless of whether his removal

can be effectuated within a reasonable period of time. In this case, there is ample objective evidence of his lack of danger, and that evidence is much more current than his criminal record from 30 years ago. Particular to this case, and unlike a prisoner who is released simply because their sentence was completed, the only reason he is at liberty in the first place is because he was able to demonstration his lack of dangerousness to the California Board of Parole Hearings (affirmed by the State Governor) which in 2021 *already* found that Mr. Phan was suitable for parole because he does not pose a danger to the community.[5] The California Board routinely rejects requests for parole that are not sufficiently documented with evidence of rehabilitation and lack of dangerousness, and the Governor as well can veto such a determination. Thus, to be paroled means Mr. Phan presented sufficient evidence both to the Board and the Governor to be granted such parole. Subsequently, ICE *already* released Mr. Phan from detention after approximately 90 days. Since this time, Mr. Phan has been dutifully complying with the terms of his Order of Supervision by checking in with ICE *on a regular basis*. *See* Dkt. 1-1. He has no further criminal history since his release on parole. Instead, he has been working to rebuild his life and reconnect with his family and community. *Id.* He has held stable employment as a Supervisor in the Leading Outreach with Valued Engagement team at the nonprofit Urban Alchemy since July 2021, and also volunteers in his community. Declaration of Christine Raymond at Exhibit A (Letter from Urban Alchemy). Thus, there is absolutely zero evidence that he would be a danger to the community, plenty of

[5] Board of Parole Hearings, "The California Parole Hearing Process Handbook" (Mar. 8, 2024), available at: https://www.cdcr.ca.gov/bph/wp-content/uploads/sites/161/2025/03/CA-Parole-Hearing-Process-Handbook-For-Publication-03-08-24-2.pdf.

evidence that he would not be any danger whatsoever, and in fact is performing services that are a benefit to the community, and absolutely no evidence of any negative change since his release from ICE detention 47 months ago. He has continued to report to ICE always as instructed. Any true due process review would thus result in a finding that there is no basis to re-detain him on grounds of dangerousness or flight risk.

ii. Mr. Phan clearly establishes a likelihood of immediate irreparable harm, and that the balance of harms and public interest weigh in favor of relief.

Given that Mr. Phan is likely to succeed on the merits of his claim, and that his claim is constitutional in nature, he has sufficiently demonstrated that he will suffer harm absent immediate injunctive relief. The factors under the balancing test established in *Mathews v. Eldridge* weigh heavily in his favor. 424 U.S. 319, 335 (1976). Respondents do not contest the well-settled principle that a violation of constitutional rights constitutes irreparable injury, but rather attempt to argue that Mr. Phan does not have constitutional rights. *Hernandez*, 872 F.3d at 995-96 ("It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'") (quoting *Melendres v. Apraio*, 695 F.3d 990, 1002 (9th Cir. 2012)); *Baird v. Bonta*, 81 F.4th 1036 1040 (9th Cir. 2023) (It is well established that the first [*Mathews*] factor is especially important when a plaintiff alleges a constitutional violation and injury. If a plaintiff in such a case shows he is likely to prevail on the merits, that showing usually demonstrates he is suffering irreparable harm no matter how brief the violation."); 11A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2948.1 (3d ed. 1998) ("When an alleged deprivation of a constitutional right is involved, . . . most courts hold that no further showing of irreparable injury is necessary.").

Moreover, Respondents' efforts to downplay the consequences of unlawful detention, or describe the irreparable harm imposed by unlawful detention as "sweeping and speculative," are astounding. Respondents wholly ignore the concrete harms immigration detention visits on individuals, and the specific harms that Mr. Phan would suffer if he were to remain detained. It

is clear that, absent a TRO, he will continue to suffer irreparable harm. *See also Hernandez*, 872 F.3d at 995 ("noting irreparable harms imposed on anyone subject to immigration detention" including "subpar medical and psychiatric care in ICE detention facilities, the economic burdens imposed on detainees and their families as a result of detention[.]").

As noted previously, Respondents do this by attempting to argue that Mr. Phan's circumstances are such that he has no due process rights whatsoever. Opp. at 7 ("Petitioner[] has no due process right to never-ending supervision-pending-removal."). This is simply not true. *See also, e.g., Hurd v. District of Columbia*, 864 F.3d 671, 683 (D.C. Cir. 2017) ("a person who is in fact free of physical confinement—even if that freedom is lawfully revocable—has a liberty interest that entitles him to constitutional due process before he is re-incarcerated").

Individuals—*including noncitizens*—released from incarceration have a liberty interest in their freedom. *Getachew v. INS*, 25 F.3d 841 (9th Cir. 1994) (noting that "[i]t is well-established that the due process clause applies to protect immigrants"). Here, upon Mr. Phan's supervised release for a period of nearly four years, without any indication that removal would be possible despite the requests to the Vietnam government, Respondents created a reasonable expectation that he would be permitted to live and work in the United States without being subject to arbitrary arrest and removal. This reasonable expectation creates constitutionally-protected liberty and property interests. *Perry v. Sindermann*, 408 U.S. 593, 601–03 (1972) (reliance on policies and practices may establish a legitimate claim of entitlement to a constitutionally-protected interest); *Newman v. Sathyavaglswaran*, 287 F.3d 786, 797 (9th Cir. 2002) ("[T]he identification of property interests under constitutional law turns on the substance of the interest recognized, not the name given that interest by the state or other independent source.") (internal quotations omitted).

Mr. Phan further demonstrates that the balance of harms and public interest weigh in favor of relief. As to the remaining factors under *Mathews*, "[a] plaintiff's likelihood of success on the merits of a constitutional claim also tips the merged third and fourth factors decisively in his favor." *Baird*, 81 F.4th 1036, 2023 WL 5763345, at *4. "[I]t would not be equitable or in the

public's interest to allow [a party] . . . to violate the requirements of federal law, especially when there are no adequate remedies available." *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014) (quoting *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013)). If a TRO is not entered, Respondents would effectively be granted permission to detain Mr. Phan arbitrarily, whenever and for however long they wish, in violation of the requirements of Due Process. "The public interest and the balance of the equities favor 'prevent[ing] the violation of a party's constitutional rights.'" *Ariz. Dream Act Coal.*, 757 F.3d at 1069; *see also Hernandez*, 872 F.3d at 996 ("The public interest benefits from an injunction that ensures that individuals are not deprived of their liberty and held in immigration detention because of bonds established by a likely unconstitutional process."); *cf. Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005) ("Generally, public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution.")

Importantly, Respondents' statement that Mr. Phan, poses "greater risk of danger and flight" is unfounded. Opp. at 8. To support this, Respondents rely wholly on their assertions that Mr. Phan was only out on supervised release for a period of 47 months (after his 29-year incarceration) and that his removal appears imminent. However, Respondents fail to note that, again, Mr. Phan was only released after years of incarceration because the California Board of Parole Hearings (affirmed by the State Governor) in 2021 found he is rehabilitated and does not pose a danger to the community. During his 47 months of supervised release, he did not demonstrate that he poses a danger to the community—to the contrary, he reconnected with loved ones, secured employment at a nonprofit helping those in need in the tenderloin community of San Francisco, continuously attended his *regular* check-in appointments at the ICE office, and, importantly, had no criminal history. Respondents' assertion that Mr. Phan poses a danger to the community if granted supervised is completely unsupported, as his actions during his prior 47-month post-release—which is not an insignificant amount of time as Respondents appear to suggest—support the opposite conclusion. Respondents' argument that Mr. Phan now poses a flight risk given that the government asserts without support that his

removal is reasonably foreseeable is equally unavailing because, as described above, there is no evidence that his removal is actually reasonably foreseeable. The government may or may not believe its own rhetoric but that does mean that Mr. Phan does. In addition, Mr. Phan had otherwise fully complied with the terms of his supervised release previously and there is no indication, beyond Respondents' mere conjecture, that he would not continue to do so.

Mr. Phan has amply demonstrated that he faces irreparable harm and that the balance of equities tips in his favor. Respondents do not challenge his argument that the government "cannot reasonably assert that it is harmed in any legally cognizable sense by being enjoined from [statutory and] constitutional violations." *Zepeda v. INS*, 753 F.2d 719, 727 (9th Cir. 1983). Respondents have all of the power to locate, arrest, and detain a non-citizen such as Mr. Phan if and when such detention is legally permissible. Respondents will thus not be injured by an order requiring them to release Mr. Phan from custody unless and until they can provide that his detention is not unconstitutionally indefinite, and he is otherwise provided with a due process hearing where the parties can fully litigate the legality of his re-detention. Such a hearing is constitutionally mandated, and the government is not injured by being held to the Constitution. *Zepeda*, 753 F.2d at 727. As such, the balance of equities and public interest weigh heavily in favor of granting Mr. Phan injunctive relief.

III. CONCLUSION

For all the aforementioned reasons, the Court should grant Mr. Phan's motion for a temporary restraining order.

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Respectfully submitted,

/s/ Christine Raymond
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