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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 San Francisco 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, Facility Administrator at Golden State Annex, McFarland, California;

Respondents-Defendants.

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

AMENDED PETITION FOR WRIT OF HABEAS CORPUS AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Challenge to Unlawful Incarceration Under Color of Immigration Detention Statutes; Request for Declaratory and Injunctive Relief

INTRODUCTION

1. Petitioner, Phong PHAN ("Mr. Phan" or "Petitioner"), by and through his undersigned counsel, hereby files this amended petition for writ of habeas corpus and complaint for declaratory and injunctive relief[1] to compel his immediate release from the immigration detention where he has been held by the U.S. Department of Homeland Security ("DHS") since being unlawfully re-detained on June 3, 2025, without at any point having been provided a due process hearing to determine whether his detention is justified. As a refugee from Vietnam who has lived in the United States since 1981, and who has been reporting to ICE on a regular basis since his release from detention four years ago, he is not subject to removal to Vietnam under the binding repatriation agreement and thus his re-detention by ICE must be held unlawful as it is limitless in duration. Thus, Mr. Phan's detention is both unconstitutional because it is indefinite, and illegal because he was not provided any pre-deprivation hearing and before his recent detention by ICE.

2. Mr. Phan has also never been ordered removed to any third country or notified of such potential removal. Given the Supreme Court of the United States' decision on June 23, 2025, in *U.S. Department of Homeland Security, et al. v. D.V.D., et al.*, No. 24A1153, 2025 WL 1732103 (June 23, 2025), which stayed the nationwide injunction that had precluded Respondents from removing noncitizens to third countries without notice and an opportunity to seek fear-based relief, U.S. Immigration and Customs Enforcement ("ICE") appears emboldened and intent to implement its campaign to send noncitizens to far corners of the planet—places they have absolutely no connection to whatsoever[2]—in violation of clear statutory obligations set forth in the Immigration and Nationality Act ("INA"), binding treaty, and due process. In the absence of

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[1] Petitioner Mr. Phan files this first amended petition as a matter of course pursuant to Fed. R. Civ. Pro. 15(a), as 21 days have not yet passed since service of the original petition. 28 U.S.C. § 2242 (a petition "may be amended or supplemented as provided in the rules of procedure applicable to civil actions"); Fed. R. Civ. Pro. 15(a)(1)(A) ("A party may amend its pleading once as a matter of course no later than…21 days after serving it.").

[2] CBS News, "Politics Supreme Court lets Trump administration resume deportations to third countries without notice for now" (June 24, 2025), available at: https://www.cbsnews.com/news/supreme-court-lifts-lower-court-order-blocking-deportations-to-third-countries-without-notice/.

the nation-wide injunction, individual lawsuits like the instant case are the only method to challenge the illegal third-country removals.

3. Mr. Phan first entered the United States in 1981 around the age of 10 as a refugee from Vietnam. He later became a U.S. lawful permanent resident.

4. Mr. Phan was released on parole from incarceration in or around May 2021, by the California Board of Parole Hearings, and the Governor of California, after meeting the required showing that he had been fully rehabilitated and that he does not pose a danger to the community, having served approximately 29 years in California state prison for convictions he sustained in 1992.[3] After his release, he was detained by U.S. Immigration and Customs Enforcement ("ICE") and underwent removal proceedings before the Immigration Court while detained. Though he expressed a fear of return to Vietnam, Mr. Phan attended only one hearing before an Immigration Judge at which he accepted a removal order. At that time (and currently to this day), he was covered by the agreement between Vietnam and the U.S. government that he could not be repatriated to Vietnam by reason of having entered the United States before July 1995.[4] Thus, his primary goal was not to remain detained while fighting his case before the Immigration Court, but rather to be released as quickly as possible after having been incarcerated for the majority of his life. Mr. Phan was released from ICE detention after approximately two months.

5. Mr. Phan was thereafter released from ICE custody In July 2021 and placed on a Form I-220B, Order of Supervision ("OSUP"), which permitted him to remain free from custody following his removal proceedings because his removal is not reasonably foreseeable and he is otherwise neither a flight risk nor a danger to the community. The OSUP also required him to attend regular check in appointments at the ICE San Francisco Office, and permitted him to

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[3] Mr. Phan was convicted of California Penal Code ("P.C.") § 187(a), § 664/187(a), and an enhancement of P.C. § 12022.5(a) in 1992.

[4] *See* U.S. Department of State, "Repatriation Agreement Between the United States of America and Vietnam" (Jan. 22, 2008), available at: https://www.state.gov/wp-content/uploads/2019/02/08-322-Vietnam-Repatriations.pdf ("Vietnamese citizens are not subject to return to Vietnam under this Agreement if they arrived in the United States before July 12, 1995....").

apply for work authorization. 8 C.F.R. § 241.5. For the past four years, Mr. Phan has complied with the terms of his OSUP, attending his appointments every months, which were later scheduled to every 60 days, and then every 90 days. Mr. Phan applied for and received a work authorization document, and he began working at the nonprofit Urban Alchemy. Dkt. 12-1 at Exh. A (Letter from Urban Alchemy).

6. On June 3, 2025, Mr. Phan attended his regularly scheduled check in appointment at the ICE San Francisco Office. Without advance notice or cause, or the opportunity for a due process hearing, ICE took Mr. Phan into custody during this routine appointment. The only explanation given to Mr. Phan for his re-detention was that he had an "arrest warrant," which presumably has existed since he was first ordered removed by the Immigration Judge, and then released from ICE detention because he could not be physically removed from the county. There is no evidence of any other change relevant to his detention status, removability, or criminal record. On information and belief, his Form I-220B OSUP has never been revoked, withdrawn, or otherwise cancelled.

7. Since his release from incarceration and then ICE custody in 2021, ICE did not seek to re-detain Mr. Phan. Instead, for the past four years, Mr. Phan has been attending his routine check-in appointments as required, and working and reconnecting with family after having been incarcerated for almost 30 years.

8. By statute and regulation, ICE has the authority to re-detain a noncitizen previously ordered removed only in specific circumstances, including where an individual violates any condition of release or the individual's conduct demonstrates that release is no longer appropriate. 8 U.S.C. § 1231; 8 C.F.R. § 241.4(l)(1)-(2). That authority, however, 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.

9. Here, Respondents created a reasonable expectation that Mr. Phan would be permitted to live and work in the United States without being subject to arbitrary arrest and removal.

10. 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); *see also Texas v. United States*, 809 F.3d 134, 174 (2015), affirmed by an equally divided court, 136 S. Ct. 2271 (2016) (explaining that "DACA involve[s] issuing benefits" to certain applicants). These benefits are entitled to constitutional protections no matter how they may be characterized by Respondents. *See, e.g., 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).

11. Further, the Supreme Court has limited the potentially indefinite post-removal order detention to a maximum of six months, because removal is not reasonably foreseeable. *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). Because the United States and Vietnam have an agreement not to remove Vietnamese individuals who entered the United States before July 12, 1995,[5] Mr. Phan's removal is not reasonably foreseeable in this case, and the government has not provided him with notice, evidence, or an opportunity to be heard on this issue either before arbitrarily re-detaining him. His continued detention without any reasonably foreseeable end point is thus unconstitutionally prolonged in violation of clear Supreme Court precedent.

12. The basic principle that individuals placed at liberty are entitled to process before the government imprisons them has particular force here, where Mr. Phan was *already* previously released first from state incarceration after being granted parole by the California Board of Parole Hearings, and then subsequently from ICE detention four years ago, after which he began to rebuild his life, including by securing employment. Under these circumstances, DHS was required to afford him the opportunity to advance arguments in favor of his freedom before it robbed him of his liberty. He must therefore be released from custody and should not be re-

[5] *Id.*

detained unless and until DHS proves to an Immigration Judge that given his detention has the potential to be unconstitutionally indefinite, that his removal to Vietnam is actually reasonably foreseeable. Several federal district courts have already ordered similar relief. *See* Declaration of Zachary Nightingale ("ZN Decl.") at Exhibit ("Exh.") C (Order in *Rodriguez Diaz v. Kaiser*, et al., 3:25-cv-05071 (N.D. Cal. June 14, 2025)), Exh. D (Order in *T.P.S. v. Kaiser*, et al., 3:25-cv-05428 (N.D. Cal. June 30, 2025)). During any custody redetermination hearing that occurs, the Immigration Judge must further consider whether, in lieu of detention, alternatives to detention exist to mitigate any risk that DHS may establish.

13. Moreover, under the INA, Respondents have a statutory obligation to remove Mr. Phan *only* to the designated country—in this case, Vietnam. 8 U.S.C. § 1231(b)(2)(A)(ii). If Mr. Phan is to be removed to a third country, Respondents *must* first assert a basis under 8 U.S.C. § 1231(b)(2)(C) and ICE *must* provide him with sufficient notice and an opportunity to respond and apply for fear-based relief as to that country, in compliance with the INA, due process, and the binding international treaty: The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[6] Currently, DHS has a policy of removing or seeking to remove individuals to third countries without first providing constitutionally adequate notice of third country removal, or any meaningful opportunity to contest that removal if the individual has a fear of persecution or torture in that country. *See* ZN Decl. at Exh. A (DHS Policy Regarding Third Country Removal). The U.S. District Court for the District of Massachusetts previously issued a nationwide preliminary injunction blocking such third country removals without notice and a meaningful opportunity to apply for relief under the Convention Against Torture, in recognition that the government's policy violates due process and the United States' obligations under the Convention Against Torture. *D.V.D., et al.* v. *U.S. Department of Homeland Security, et al. v.*, No. 25-10676-BEM (D. Mass. Apr. 18, 2025). The U.S. Supreme Court has since granted the government's motion to stay the injunction on June 23, 2025, just before the Court published *Trump v. Casa*, No. 24A884 (June 27, 2025) limiting nationwide

[6] United Nations, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984), available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading.

injunctions. Thus, the Supreme Court's order, which is not accompanied by an opinion, signals only disagreement with the nature, and not the substance, of the nationwide preliminary injunction. Thus, in this individual habeas petition, Mr. Phan submits that he cannot be removed to any third country unless he is first provided with adequate notice and a meaningful opportunity to apply for protection under the Convention Against Torture. One such federal district court has already issued similar relief. ZN Decl. at Exh. B (Order in *J.R. v. Bostock, et al.*,2:25-cv-01161-JNW (W.D. Wash. June 30, 2025)).

CUSTODY

14. Petitioner was detained by DHS at the Golden State Annex ICE Detention Center in McFarland, California, where he was transferred after being arrested by ICE officers at the San Francisco Field Office, at the time of filing the habeas petition in this matter on June 23, 2025. Dkt. 1. Since this time, Mr. Phan has been transferred to the Central Arizona Florence Detention Center in Florence, Arizona on June 24, 2025, and then to the Alexandria Staging Facility in Alexandria, Louisiana. This Court maintains jurisdiction over this matter because it was filed when Petitioner was still within the jurisdiction of this Court. *Rumsfeld v. Padilla*, 542 U.S. 426, 441 (2004). Prior to and since being arrested by ICE in San Francisco, Petitioner has not been provided with a constitutionally compliant hearing to assess whether his re-detention is warranted.

JURISDICTION

15. This Court has jurisdiction over the present action pursuant to 28 U.S.C. § 1331, general federal question jurisdiction; 5 U.S.C. § 701 *et seq.*, All Writs Act; 28 U.S.C. § 2241 *et seq.*, habeas corpus; 28 U.S.C. § 2201, the Declaratory Judgment Act; Art. 1, § 9, Cl. 2 of the United States Constitution (Suspension Clause); Art. 3 of the United States Constitution, and the common law, as Petitioner is detained under color of the authority of the United States, and such custody is in violation of the Constitution, laws, regulations, and, or treaties of the United States.

16. This Court may grant relief pursuant to 28 U.S.C. § 2241, the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq., and the All Writs Act, 28 U.S.C. § 1651 to protect Petitioner's rights under the Due Process Clause of the Fifth Amendment to the United States Constitution, the

Excessive Bail Clause of the Eighth Amendment, and under applicable Federal law, and to issue a writ of habeas corpus for his immediate release. *See generally INS v. St. Cyr*, 533 U.S. 289 (2001); *Zadvydas v. Davis*, 533 U.S. 678 (2001).

REQUIREMENTS OF 28 U.S.C. § 2243

17. The Court must grant the petition for writ of habeas corpus or issue an order to show cause ("OSC") to Respondents "forthwith," unless the petitioner is not entitled to relief. 28 U.S.C. § 2243. If an OSC is issued, the Court must require Respondents to file a return "within *three days* unless for good cause additional time, *not exceeding twenty days*, is allowed." *Id.* (emphasis added).

18. Courts have long recognized the significance of the habeas statute in protecting individuals from unlawful detention. The Great Writ has been referred to as "perhaps the most important writ known to the constitutional law of England, affording as it does a *swift* and imperative remedy in all cases of illegal restraint or confinement." *Fay v. Noia*, 372 U.S. 391, 400 (1963) (emphasis added).

19. Habeas corpus must remain a swift remedy. Importantly, "the statute itself directs courts to give petitions for habeas corpus 'special, preferential consideration to insure expeditious hearing and determination.'" *Yong v. INS*, 208 F.3d 1116, 1120 (9th Cir. 2000) (internal citations omitted). The Ninth Circuit warned against any action creating the perception "that courts are more concerned with efficient trial management than with the vindication of constitutional rights." *Id.*

VENUE

20. Venue is properly before this Court pursuant to 28 U.S.C. § 1391(e) because the Respondents are employees or officers of the United States, acting in their official capacity; because a substantial part of the events or omissions giving rise to the claim occurred in the Eastern District of California; because Petitioner is currently detained in the Eastern District of California; and because there is no real property involved in this action.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

21. For habeas claims, exhaustion of administrative remedies is prudential, not jurisdictional.

Hernandez, 872 F.3d at 988. A court may waive the prudential exhaustion requirement if "administrative remedies are inadequate or not efficacious, pursuit of administrative remedies would be a futile gesture, irreparable injury will result, or the administrative proceedings would be void." *Id.* (*quoting Laing v. Ashcroft*, 370 F.3d 994, 1000 (9th Cir. 2004) (citation and quotation marks omitted)). Petitioner asserts that exhaustion is satisfied as there is no administrative jurisdiction over this detention status because he already has a final order of removal.

22. No statutory exhaustion requirements apply to Petitioner's claim of unlawful custody in violation of his due process rights, and there are no administrative remedies that he needs to exhaust. *See Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1058 (9th Cir. 1995) (finding exhaustion to be a "futile exercise because the agency does not have jurisdiction to review" constitutional claims); *In re Indefinite Det. Cases*, 82 F. Supp. 2d 1098, 1099 (C.D. Cal. 2000) (same).

PARTIES

23. Petitioner Phong PHAN was born in Vietnam and fled to the United States as a refugee in 1981, where he subsequently became a U.S. lawful permanent resident. He previously served approximately 29 years of incarceration in California state prison, and several months in ICE detention, after which he was released and placed on an OSUP. He attended regular check-ins at the ICE San Francsico Office for four years, and he worked pursuant to his work authorization document and began to rebuild his life during this time. On June 3, 2025, ICE, without prior notice or a hearing, took Petitioner into custody during a routine check-in appointment in San Francisco, California.

24. Respondent Moises BECERRA is the Acting Field Office Director of ICE, in San Francisco, California and is named in his official capacity. ICE is the component of the DHS that is responsible for detaining and removing noncitizens according to immigration law and oversees custody determinations. In his official capacity, he is the legal custodian of Petitioner.

25. Respondent Caleb VITELLO is the Acting Director of ICE and is named in his official capacity. Among other things, ICE is responsible for the administration and enforcement of the

immigration laws, including the removal of noncitizens. In his official capacity as head of ICE, he is the legal custodian of Petitioner.

26. Respondent Kristi NOEM is the Secretary of the DHS and is named in her official capacity. DHS is the federal agency encompassing ICE, which is responsible for the administration and enforcement of the INA and all other laws relating to the immigration of noncitizens. In her capacity as Secretary, Respondent Noem has responsibility for the administration and enforcement of the immigration and naturalization laws pursuant to section 402 of the Homeland Security Act of 2002, 107 Pub. L. No. 296, 116 Stat. 2135 (Nov. 25, 2002); *see also* 8 U.S.C. § 1103(a). Respondent Noem is the ultimate legal custodian of Petitioner.

27. Respondent Pam BONDI is the Attorney General of the United States and the most senior official in the U.S. Department of Justice (DOJ) and is named in her official capacity. She has the authority to interpret the immigration laws and adjudicate removal cases. The Attorney General delegates this responsibility to the Executive Office for Immigration Review (EOIR), which administers the immigration courts and the BIA.

28. Respondent Tonya ANDREWS is the Facility Administrator of Golden State Annex where Petitioner is being held. Respondent Andrews oversees the day-to-day operations of Golden State Annex and acts at the Direction of Respondents Vitello, Noem, and Becerra. She is a custodian of Petitioner and is named in her official capacity.

STATEMENT OF FACTS

29. Mr. Phan first entered the United States in 1981 at the age of approximately 10 as a refugee from Vietnam. He later became a U.S. lawful permanent resident.

30. Mr. Phan was released on parole from incarceration in 2021, after the required showing to the California Board of Parole Hearings and the California Governor that he had been fully rehabilitated after serving approximately 29 years in California state prison for convictions he sustained in 1996.[7] After his release, he was detained by ICE and underwent removal proceedings while detained. At that time, Vietnamese individuals like Mr. Phan who entered the United States before July 1995 would have been aware of the repatriation agreement between the

[7] *See supra* n.3.

United States and Vietnam that applied to them which prevented repatriation to Vietnam.[8] He was ordered removed by the Immigration Judge on May 27, 2021, after attending one hearing before an Immigration Judge at the Immigration Court in Adelanto, California. Though he did indeed fear removal to Vietnam, he accepted the removal order after one hearing because he knew he would not actually be deported, and his primary goal was to be released from detention as quickly as possible so that he could begin to rebuild his life after being incarcerated for 29 years.

31. Due to the existing repatriation agreement, Mr. Phan could not be removed to Vietnam, and therefore his continued detention by ICE would be indefinite and unconstitutionally prolonged if he were to remain in ICE detention. Therefore, consistent with Supreme Court law, he was thereafter released from ICE custody after several months and placed on an OSUP in 2021, requiring him to attend regular check in appointments at the ICE San Francisco Office. For the past four years, Mr. Phan has complied with the terms of his OSUP by regularly checking in at the ICE San Francisco Office on a regular basis. He also applied for and received a work authorization document, which allowed him to secure employment at the nonprofit Urban Alchemy, which assists individuals with reintegrating into the workforce after serving long prison sentences.

32. On June 3, 2025, Mr. Phan attended his regularly scheduled check in appointment at the ICE San Francisco Office. Without notice or the opportunity for a due process hearing, ICE took Mr. Phan into custody during this routine appointment.

33. The only explanation given to Mr. Phan for his re-detention was that he had an arrest warrant, which presumably has existed since he was first ordered removed by the Immigration Court and before his release from ICE detention due to the fact that he could not be physically removed to any country. On information and belief, his Form I-220B OSUP has never been revoked, withdrawn, or otherwise cancelled.

34. Since his release from incarceration and then ICE custody in 2021, ICE did not seek to re-detain Mr. Phan. Instead, for the past four years, Mr. Phan was attending his routine check-in

[8] *See supra* n.2.

appointments as required, and working and reconnecting with family after having been incarcerated for approximately 30 years.

35. On information and belief, on January 25, 2025, officials in the new Trump administration directed senior ICE officials to increase arrests to meet daily quotas. Specifically, each field office was instructed to make 75 arrests per day.[9]

36. On June 3, 2025, when Mr. Phan arrived at the ICE office in San Francisco, California, for his routine check-in, ICE, without prior notice or a hearing, took him into custody.

37. ICE did not provide any due process to him regarding his detention status.

38. Also on June 3, 2025, ICE transferred Mr. Phan to the Golden State Annex (GSA), located at 611 Frontage Rd., McFarland, California 93250. He has since been transferred to the Central Arizona Florence Detention Center in Florence, Arizona on June 24, 2025, and then to the Alexandria Staging Facility in Alexandria, Louisiana.

39. Respondents previously submitted a declaration indicating that at no point has ICE ever requested travel documents from the government of Vietnam for Mr. Phan. Dkt. 11-1. No evidence has been presented or made available to Mr. Phan that the government of Vietnam has ever indicated that it would issue such travel documents that would not be in compliance with the repatriation treaty in existence. *Id.*

40. Mr. Phan has remained unlawfully detained without having been provided a due process hearing, and his prolonged and potentially indefinite detention is not constitutional, given that his removal to Vietnam, the only country to which he has been ordered removed, is not reasonably foreseeable.

41. Mr. Phan is also at risk of being unlawfully removed to a third country without constitutionally adequate notice and a meaningful opportunity to apply for protection under the Convention Against Torture, in violation of the INA, binding international treaty, and due process. Currently, DHS has a policy of removing or seeking to remove individuals to third countries *without* first providing adequate notice of third country removal, or any meaningful

[9] *See* "Trump officials issue quotas to ICE officers to ramp up arrests," *Washington Post* (Jan. 26, 2025), available at: https://www.washingtonpost.com/immigration/2025/01/26/ice-arrests-raids-trump-quota/.

opportunity to contest that removal if the individual has a fear of persecution or torture in that country. *See* ZN Decl. at Exh. A (DHS Policy Regarding Third Country Removal).

42. Intervention from this Court is therefore required to ensure that Mr. Phan does not continue to suffer irreparable harm in the form of unjustified, prolonged, and indefinite detention, and further violation of his rights in the form of summary removal to a third country.

LEGAL BACKGROUND

Right to a Hearing Prior to Re-incarceration

43. Following a final order of removal, ICE is directed by statute to detain an individual for ninety (90) days in order to effectuate removal. 8 U.S.C. § 1231(a)(2). This ninety (90) day period, also known as "the removal period," generally commences as soon as a removal order becomes administratively final. *Id.* at § 1231(a)(1)(A); § 1231(a)(1)(B).

44. If ICE fails to remove an individual during the ninety (90) day removal period, the law requires ICE to release the individual under conditions of supervision, including periodic reporting. 8 U.S.C. § 1231(a)(3) ("If the alien . . . is not removed within the removal period, the alien, pending removal, shall be subject to supervision."). Limited exceptions to this rule exist. Specifically, ICE "may" detain an individual beyond ninety days if the individual was ordered removed on criminal grounds or is determined to pose a danger or flight risk. 8 U.S.C. § 1231(a)(6). However, ICE's authority to detain an individual beyond the removal period under such circumstances is not boundless. Rather, it is constrained by the constitutional requirement that detention "bear a reasonable relationship to the purpose for which the individual [was] committed." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Because the principal purpose of the post-final-order detention statute is to effectuate removal, detention bears no reasonable relation to its purpose if removal cannot be effectuated. *Id.* at 697.

45. Post-final order detention is only authorized for a "period reasonably necessary to secure removal," a period that the Court determined to be presumptively six months. *Id.* at 699-701. After this six (6) month period, if a detainee provides "good reason" to believe that his or her removal is not significantly likely in the reasonably foreseeable future, "the Government must

respond with evidence sufficient to rebut that showing." *Id.* at 701. If the government cannot do so, the individual must be released.

46. 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 ninety 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.

47. Even where detention meets the *Zadvydas* standard for reasonable foreseeability, detention violates the Due Process Clause unless it is "reasonably related" to the government's purpose, which is to prevent danger or flight risk. *See 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. This is especially so because the California Board of Parole Hearings (affirmed by the State Governor) has *already* found that Mr. Phan was suitable for parole because he does not pose a danger to the community, and ICE *already* released Mr. Phan from detention, subsequent to the California Board of Parole Hearings' findings.

48. The government's own regulations contemplate this requirement. They dictate that even after ICE determines that removal is reasonably foreseeable—and that detention therefore does not per se exceed statutory authority—the government must still determine whether continued detention is warranted based on flight risk or danger. *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).

49. The regulations at 8 C.F.R. § 241.4 set forth the custody review process that existed even before *Zadvydas*. This mandated process, known as the post-order custody review, requires ICE to conduct "90-day custody reviews" prior to expiration of the ninety-day removal period and to consider release of individuals who pose no danger or flight risk. 8 C.F.R. § 241.4(e)-(f). Among the factors to be considered in these custody reviews are "ties to the United States such as the number of close relatives residing here lawfully"; whether the noncitizen "is a significant flight risk"; and "any other information that is probative of whether" the noncitizen is likely to "adjust to life in a community," "engage in future acts of violence," "engage in future criminal activity," pose a danger to themselves or others, or "violate the conditions of his or her release from immigration custody pending removal from the United States." *Id.*

50. Individuals with final orders who are released after a post-order custody review are subject to Forms I-220B, Order of Supervision. 8 C.F.R. § 241.4(j). After an individual has been released on an order of supervision, as Mr. Phan was, ICE cannot revoke such an order without cause or adequate legal process. 8 C.F.R. § 241.13(i)(2)-(3).

Petitioner's Protected Liberty Interest in His Release

51. Petitioner's liberty from immigration custody is protected by the Due Process Clause: "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

52. For four years preceding his re-detention on June 4, 2025, Petitioner exercised that freedom under his prior release from ICE custody in 2021. He thus retained a weighty liberty interest under the Due Process Clause of the Fifth Amendment in avoiding re-incarceration. *See Young v. Harper*, 520 U.S. 143, 146-47 (1997); *Gagnon v. Scarpelli*, 411 U.S. 778, 781-82 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 482-483 (1972). Moreover, the Supreme Court has recognized that post-removal order detention is potentially indefinite and thus unconstitutional without some limitation. *Zadvydas*, 533 U.S. at 701.In this case, in the absence of a repatriation agreement that actually permits Petitioner's removal to Vietnam, his removal is not foreseeable at all, let alone reasonably. Therefore, his continued detention is unconstitutional.

53. Just as importantly, Petitioner continued presenting himself before ICE for his regular check-in appointments for the past four years, where ICE did not seek to re-arrest him during this time. ICE instead gave him a future date and time to appear again.

54. In *Morrissey*, the Supreme Court examined the "nature of the interest" that a parolee has in "his continued liberty." 408 U.S. at 481-82. The Court noted that, "subject to the conditions of his parole, [a parolee] can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life." *Id.* at 482. The Court further noted that "the parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions." *Id.* The Court explained that "the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a grievous loss on the parolee and often others." *Id.* In turn, "[b]y whatever name, the liberty is valuable and must be seen within the protection of the [Fifth] Amendment." *Morrissey*, 408 U.S. at 482.

55. This basic principle—that individuals have a liberty interest in their release—has been reinforced by both the Supreme Court and the circuit courts on numerous occasions. *See, e.g.*, *Young v. Harper*, 520 U.S. at 152 (holding that individuals placed in a pre-parole program created to reduce prison overcrowding have a protected liberty interest requiring pre-deprivation process); *Gagnon v. Scarpelli*, 411 U.S. at 781-82 (holding that individuals released on felony probation have a protected liberty interest requiring pre-deprivation process). As the First Circuit has explained, when analyzing the issue of whether a specific conditional release rises to the level of a protected liberty interest, "[c]ourts have resolved the issue by comparing the specific conditional release in the case before them with the liberty interest in parole as characterized by *Morrissey*." *Gonzalez-Fuentes v. Molina*, 607 F.3d 864, 887 (1st Cir. 2010) (internal quotation marks and citation omitted). *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") (citing *Young*, 520 U.S. at 152, *Gagnon*, 411 U.S. at 782, and *Morrissey*, 408 U.S. at 482).

56. In fact, it is well-established that an individual maintains a protectable liberty interest even where the individual obtains liberty through a mistake of law or fact. *See id.*; *Gonzalez-Fuentes*, 607 F.3d at 887; *Johnson v. Williford*, 682 F.2d 868, 873 (9th Cir. 1982) (noting that due process considerations support the notion that an inmate released on parole by mistake, because he was serving a sentence that did not carry a possibility of parole, could not be re-incarcerated because the mistaken release was not his fault, and he had appropriately adjusted to society, so it "would be inconsistent with fundamental principles of liberty and justice" to return him to prison) (internal quotation marks and citation omitted).

57. Here, when this Court "'compar[es] the specific conditional release in [Petitioner's case], with the liberty interest in parole as characterized by *Morrissey*,'" it is clear that they are strikingly similar. *See Gonzalez-Fuentes*, 607 F.3d at 887. Just as in *Morrissey*, Petitioner's release "enables him to do a wide range of things open to persons'" who have never been in custody or convicted of any crime, including to live at home, work with his community, and "be with family and friends and to form the other enduring attachments of normal life." *Morrissey*, 408 U.S. at 482.

58. Since his release in 2021, which came after approximately 29 years of incarceration and several months in ICE custody, Petitioner has been focused on rebuilding his life, including by reconnecting with family and securing employment.

Petitioner's Liberty Interest Mandated a Due Process Hearing Before any Re-Detention

59. Petitioner asserts that, here, (1) where his detention is civil, (2) where he has diligently complied with ICE's reporting requirements on a regular basis, and (3) where on information and belief ICE officers arrested Petitioner merely to fulfill an arrest quota because his removal is not reasonably foreseeable and potentially indefinite, due process mandates that he was required to receive notice and a hearing before an Immigration Judge prior to any re-detention.

60. "Adequate, or due, process depends upon the nature of the interest affected. The more important the interest and the greater the effect of its impairment, the greater the procedural safeguards the [government] must provide to satisfy due process." *Haygood v. Younger*, 769 F.2d 1350, 1355-56 (9th Cir. 1985) (en banc) (citing *Morrissey*, 408 U.S. at 481-82). This Court

must "balance [Petitioner's] liberty interest against the [government's] interest in the efficient administration of" its immigration laws in order to determine what process he is owed to ensure that ICE does not unconstitutionally deprive him of his liberty. *Id.* at 1357. Under the test set forth in *Mathews v. Eldridge*, this Court must consider three factors in conducting its balancing test: "first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards; and finally the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." *Haygood*, 769 F.2d at 1357 (*citing Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

61. The Supreme Court "usually has held that the Constitution requires some kind of a hearing *before* the State deprives a person of liberty or property." *Zinermon v. Burch*, 494 U.S. 113, 127 (1990) (emphasis in original). Only in a "special case" where post-deprivation remedies are "the only remedies the State could be expected to provide" can post-deprivation process satisfy the requirements of due process. *Zinermon*, 494 U.S. at 985. Moreover, only where "one of the variables in the *Mathews* equation—the value of predeprivation safeguards—is negligible in preventing the kind of deprivation at issue" such that "the State cannot be required constitutionally to do the impossible by providing predeprivation process," can the government avoid providing pre-deprivation process. *Id.*

62. Because, in this case, the provision of a pre-deprivation hearing was both possible and valuable to preventing an erroneous deprivation of liberty, ICE was required to provide Petitioner with notice and a hearing *prior* to any re-incarceration and revocation of his OSUP. *See Morrissey*, 408 U.S. at 481-82; *Haygood*, 769 F.2d at 1355-56; *Jones*, 393 F.3d at 932; *Zinermon*, 494 U.S. at 985; *see also Youngberg v. Romeo*, 457 U.S. 307, 321-24 (1982); *Lynch v. Baxley*, 744 F.2d 1452 (11th Cir. 1984) (holding that individuals awaiting involuntary civil commitment proceedings may not constitutionally be held in jail pending the determination as to whether they can ultimately be recommitted). Under *Mathews*, "the balance weighs heavily in favor of [Petitioner's] liberty" and required a pre-deprivation hearing before an Immigration

Judge, which ICE failed to provide.

Petitioner's Private Interest in His Liberty is Profound

63. Under *Morrissey* and its progeny, individuals conditionally released from serving a criminal sentence have a liberty interest that is "valuable." *Morrissey*, 408 U.S. at 482. In addition, the principles espoused in *Hurd* and *Johnson*—that 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—apply with even greater force to individuals like Petitioner, who have also been released from prior ICE custody. Parolees and probationers have a diminished liberty interest given their underlying convictions. *See, e.g.*, *U.S. v. Knights*, 534 U.S. 112, 119 (2001); *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987). Nonetheless, even in the criminal parolee context, the courts have held that the parolee cannot be re-arrested without a due process hearing in which they can raise any claims they may have regarding why their re-incarceration would be unlawful. *See Gonzalez-Fuentes,* 607 F.3d at 891-92; *Hurd*, 864 F.3d at 683. Thus, Petitioner retains a truly weighty liberty interest even though he was under conditional release prior to his re-arrest.

64. What is at stake in this case for Petitioner is one of the most profound individual interests recognized by our legal system: whether ICE may unilaterally nullify a prior release decision and be able to take away his physical freedom, i.e., his "constitutionally protected interest in avoiding physical restraint." *Singh v. Holder*, 638 F.3d 1196, 1203 (9th Cir. 2011) (internal quotation omitted). "Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). *See also Zadvydas*, 533 U.S. at 690 ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects."); *Cooper v. Oklahoma*, 517 U.S. 348 (1996).

65. Thus, it is clear that there is a profound private interest at stake in this case, which must be weighed heavily when determining what process he is owed under the Constitution. *See Mathews*, 424 U.S. at 334-35.

The Government's Interest in Keeping Petitioner in Detention is Low and the Burden on the Government to Release Him from Custody is Minimal

66. The government's interest in keeping Petitioner in detention without a due process hearing is low, and when weighed against Petitioner's significant private interest in his liberty, the scale tips sharply in favor of releasing Petitioner from custody unless and until the government demonstrates that he is a flight risk or danger to the community. It becomes abundantly clear that the *Mathews* test favors Petitioner when the Court considers that the process Petitioner seeks—release from custody after the California Board of Parole Hearings has *already* found that Mr. Phan does not pose a danger to the community, and ICE *already* released Mr. Phan from detention after several months, all of which occurred *four years ago* and where nothing in the interim has changed to warrant re-detention after —is a standard course of action for the government. In the alternative, providing Petitioner with a hearing before an Immigration Judge to determine whether there is evidence that Petitioner is a flight risk or danger to the community would impose only a *de minimis* burden on the government, because the government routinely conducts these reviews for individuals in Petitioner's same circumstances. 8 C.F.R. § 241.4(e)-(f).

67. As immigration detention is civil, it can have no punitive purpose. The government's only interests in holding an individual in immigration detention can be to prevent danger to the community or to ensure a noncitizen's appearance at immigration proceedings. *See Zadvydas*, 533 U.S. at 690. Moreover, the Supreme Court has made clear that indefinite detention of noncitizens who cannot be removed to the country of the removal order, is unconstitutional. In this case, the government cannot plausibly assert that it had a sudden interest in detaining Petitioner due to alleged dangerousness, or due to a change in the foreseeability of his removal to Vietnam, as his circumstances have not changed since his release from ICE custody in 2021.

68. Petitioner has continued to appear before ICE on a regular basis for each and every appointment that has been scheduled. *See Morrissey*, 408 U.S. at 482 ("'It is not sophistic to attach greater importance to a person's justifiable reliance in maintaining his conditional freedom so long as he abides by the conditions on his release, than to his mere anticipation or hope of freedom'") (quoting *United States ex rel. Bey v. Connecticut Board of Parole*, 443 F.3d 1079, 1086 (2d Cir. 1971).

69. As to flight risk, Petitioner's post-release conduct in the form of full compliance with his check-in requirements further confirms that he is not a flight risk and that he is likely to present himself at any future ICE appearances, as he always has done. The government's interest in detaining Petitioner at this time is therefore low. That ICE has a new policy to make a minimum number of arrests each day under the new administration does not constitute a material change in circumstances or increase the government's interest in detaining him.[10] Moreover, nothing has changed regarding the lack of foreseeability of his removal to Vietnam.

70. Release from custody until ICE assesses and demonstrated that Petitioner is a flight risk or danger to the community, or that his detention is not going to be indefinite, is far *less* costly and burdensome for the government than keeping him detained. As the Ninth Circuit noted in 2017, which remains true today, "[t]he costs to the public of immigration detention are 'staggering': $158 each day per detainee, amounting to a total daily cost of $6.5 million." *Hernandez*, 872 F.3d at 996. If, in the alternative, the Court chooses to order a hearing for Petitioner at which the government bears the burden of justifying his continued detention, the government would bear no additional cost if the hearing is scheduled within seven days, rather than allowing Petitioner to sit in detention for days or weeks awaiting a hearing.

Without Release from Custody until the Government Provides a Due Process Hearing, the Risk of an Erroneous Deprivation of Liberty is High

71. Releasing Petitioner from custody until he is provided a pre-deprivation hearing would decrease the risk of him being erroneously deprived of his liberty. Before Petitioner can be lawfully detained, he must be provided with a hearing before an Immigration Judge at which the government is held to show that his detention will not be indefinite, or that the circumstances have changed since his release in 2021 such that evidence exists to establish that Petitioner is a danger to the community or a flight risk.

72. Under the process that ICE maintains is lawful—which affords Petitioner no process whatsoever—ICE can simply re-detain him at any point if the agency desires to do so, as ICE did on June 4, 2025. Petitioner has already been erroneously deprived of his liberty when he was

[10] *Id.*

detained at his check in, and the risk he will continue to be deprived is high if ICE is permitted to keep him detention after making a unilateral decision to re-detain him. Pursuant to 8 C.F.R. § 241.4(l), revocation of release on an OSUP is at the discretion of the Executive Associate Commissioner. Thus, the regulations permit ICE to unilaterally re-detain individuals, even for an oversight of any kind. After re-arrest, ICE makes its own, one-sided custody determination and can decide whether the agency wants to hold Petitioner. 8 C.F.R. § 241.4(e)-(f).

73. By contrast, the procedure Petitioner seeks—release from custody until he is provided a hearing in front of an Immigration Judge at which the government that his detention will not be indefinite, or otherwise that the circumstances have changed since his release in 2021 to justify his detention—is much more likely to produce accurate determinations regarding these factual disputes. *See Chalkboard, Inc. v. Brandt*, 902 F.2d 1375, 1381 (9th Cir.1989) (when "delicate judgments depending on credibility of witnesses and assessment of conditions not subject to measurement" are at issue, the "risk of error is considerable when just determinations are made after hearing only one side"). "A neutral judge is one of the most basic due process protections." *Castro-Cortez v. INS*, 239 F.3d 1037, 1049 (9th Cir. 2001), *abrogated on other grounds by Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006). The Ninth Circuit has noted that the risk of an erroneous deprivation of liberty under *Mathews* can be decreased where a neutral decisionmaker, rather than ICE alone, makes custody determinations. *Diouf v. Napolitano* ("*Diouf II*"), 634 F.3d 1081, 1091-92 (9th Cir. 2011).

74. Due process also requires consideration of alternatives to detention at any custody redetermination hearing that may occur. The primary purpose of immigration detention is to ensure removal *if* reasonably foreseeable. *Zadvydas*, 533 U.S. at 697. Detention is not reasonably related to this purpose if, as here, removal is not actually foreseeable. Accordingly, alternatives to detention must be considered in determining whether Petitioner's re-incarceration is warranted.

Right to Constitutionally Adequate Procedures Prior to Third Country Removal

75. Under the INA, Respondents have a clear and non-discretionary duty to execute final orders of removal only to the designated country of removal. The statute explicitly states that a

noncitizen "*shall* remove the [noncitizen] to the country the [noncitizen] . . . designates." 8 U.S.C. § 1231(b)(2)(A)(ii) (emphasis added). And even where a noncitizen does not designate the country of removal, the statute further mandates that DHS "shall remove the alien to a country of which the alien is a subject, national, or citizen. *See id.* § 1231(b)(2)(D); *see also generally Jama v. ICE*, 543 U.S. 335, 341 (2005).

76. As the Supreme Court has explained, such language "generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive," *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661 (2007) (quoting *Ass'n of Civilian Technicians v. Fed. Labor Relations Auth.*, 22 F.3d 1150, 1153 (D.C. Cir. 1994)); *see also Black's Law Dictionary* (11th ed. 2019) ("Shall" means "[h]as a duty to; more broadly, is required to . . . . This is the mandatory sense that drafters typically intend and that courts typically uphold."); *United States v. Monsanto*, 491 U.S. 600, 607 (1989) (finding that "shall" language in a statute was unambiguously mandatory). Accordingly, any imminent third country removal fails to comport with the statutory obligations set forth by Congress in the INA and is unlawful.

77. Moreover, prior to any third country removal, ICE must provide Petitioner with sufficient notice and an opportunity to respond and apply for fear-based relief as to that country, in compliance with the INA, due process, and the binding international treaty: The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[11] Currently, DHS has a policy of removing or seeking to remove individuals to third countries without first providing constitutionally adequate notice of third country removal, or any meaningful opportunity to contest that removal if the individual has a fear of persecution or torture in that country. ZN Decl. at Exh. A (DHS Policy Regarding Third Country Removal). This policy clearly violates due process and the United States' obligations under the Convention Against Torture.

78. The U.S. District Court for the District of Massachusetts previously issued a nationwide preliminary injunction blocking such third country removals without notice and a meaningful

[11] *See supra* n.6.

opportunity to apply for relief under the Convention Against Torture, in recognition that the government's policy violates due process and the United States' obligations under the Convention Against Torture. *D.V.D., et al.* v. *U.S. Department of Homeland Security, et al. v.*, No. 25-10676-BEM (D. Mass. Apr. 18, 2025). The U.S. Supreme Court has since granted the government's motion to stay the injunction on June 23, 2025, just before the Court published *Trump v. Casa*, No. 24A884 (June 27, 2025) limiting nationwide injunctions. Thus, the Supreme Court's order, which is not accompanied by an opinion, signals only disagreement with nature, and not the substance, of the nationwide preliminary injunction.

79. Thus, it is clear that if Mr. Phan were to be removed to any third country it would violate his due process rights unless he is first provided with constitutionally adequate notice and a meaningful opportunity to apply for protection under the Convention Against Torture. In the absence of any other injunction, intervention by this Court is necessary to protect those rights.

FIRST CAUSE OF ACTION

Unlawful Re-Detention

80. Petitioner re-alleges and incorporates herein by reference, as if set forth fully herein, the allegations in all the preceding paragraphs.

81. Petitioner was previously released by Respondents because he did not pose a danger or flight risk. As long as he complies with the conditions of his release, Respondents have authority to revoke release only if circumstances have changed. 8 C.F.R. § 241.13(i)(2); 8 C.F.R. § 1231(a)(6).

82. Respondents' actions are arbitrary, capricious, an abuse of discretion, and contrary to law. 5 U.S.C. § 706(a)(2)(A). The fact that a decision-making process involves discretion does not prevent an individual from having a protectable liberty interest. *Young v. Harper*, 520 U.S. 143, 150 (1997); *Ortega-Rangel v. Sessions*, 313 F. Supp. 3d 993, 1001 (N.D. Cal 2018) (Corley, J.). Just like people on pre-parole, parole, probation status, bail, or bond have a liberty interest, so too does Petitioner have a liberty interest in remaining out of custody on his Forms I-220B OSUP. *Ortega v. Bonnar*, 415 F. Supp. 3d 963, 2019 WL 6251231 (N.D. Cal. 2019). He should therefore be immediately released and in the future provided a full and fair hearing before an

Immigration Judge where the government bears the burden of showing that circumstances have changed such that his removal is reasonably foreseeable, and otherwise evidence of his dangerousness and flight risk. *Id.*

SECOND CAUSE OF ACTION

Violation of Procedures for Revocation of Release

83. Petitioner re-alleges and incorporates herein by reference, as if set forth fully herein, the allegations in all the preceding paragraphs.

84. Respondents must notify Petitioner of the reason for his detention. 8 C.F.R. § 241.13(i)(3). The regulations also require Respondents to afford Petitioner an initial interview promptly after his detention at which he can respond to the purported reasons for revocation. *Id.*

85. Respondents have not provided Petitioner adequate and timely notice of the reasons for revocation. Respondents also have not timely provided Petitioner with an initial interview or an opportunity to respond.

THIRD CAUSE OF ACTION

Violation of the INA and Applicable Regulations

86. Petitioner re-alleges and incorporates herein by reference, as if set forth fully herein, the allegations in all the preceding paragraphs.

87. The INA provides for detention during the ninety (90) day "removal period" that begins immediately after a noncitizen's order of removal becomes final. 8 U.S.C. § 1231(a)(1). After the ninety (90) day removal period, the INA and its applicable regulations provide that detaining noncitizens is generally permissible only upon notice to the noncitizen and after an individualized determination of dangerousness and flight risk. *See* 8 U.S.C. § 1231(a)(6); 8 C.F.R. § 241.4(d), (f), (h) & (k).

88. Respondents are not permitted to detain Petitioner on the basis of his prior order of removal and without any determination of whether circumstances have changed such that his removal is reasonably foreseeable, and a determination of his danger and flight risk, by an Immigration Judge. This is especially true where, as here, Petitioner received a determination

from the agency issuing them Forms I-220B that permitting him to remain out of custody in the first place. 8 C.F.R. § 241.13(i)(2)-(3).

FOURTH CAUSE OF ACTION

Procedural Due Process – Unconstitutionally Indefinite Detention

U.S. Const. amend. V

89. Petitioner re-alleges and incorporates herein by reference, as if set forth fully herein, the allegations in all the preceding paragraphs.

90. The Due Process Clause of the Fifth Amendment forbids the government from depriving any "person" of liberty "without due process of law." U.S. Const. amend. V.

91. Other than as punishment for a crime, due process permits the government to take away liberty only "in certain special and narrow nonpunitive circumstances ... where a special justification ... outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Zadvydas*, 533 U.S. 678, 690. Such special justification exists only where a restraint on liberty bears a "reasonable relation" to permissible purposes. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972); *see also Foucha v. Louisiana*, 504 U.S. 71, 79 (1992). In the immigration context, those purposes are "ensuring the appearance of aliens at future immigration proceedings and preventing danger to the community." *Zadvydas*, 533 U.S. at 690 (quotations omitted).

92. Those substantive limitations on detention are closely intertwined with procedural due process protections. *Foucha*, 504 U.S. 78-80. Noncitizens have a right to adequate procedures to determine whether their detention in fact serves the purposes of ensuring their appearance or protecting the community. *Id.* at 79; *Zadvydas*, 533 U.S. 692; *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942, 949 (9th Cir. 2008). Where laws and regulations fail to provide such procedures, the habeas court may assess whether the noncitizen's immigration detention is reasonably related to the purposes of ensuring his appearance or protecting the community, *Zadvydas*, 533 U.S. at 699, or require release.

93. Under this framework, Petitioner's release is required because his re-detention violates his due process rights.

94. Further, Petitioner had a vested liberty interest in his release. Due Process does not permit the government to strip him of that liberty without a future hearing prior to any re-detention. *See Morrissey*, 408 U.S. at 487-488.

95. Because Petitioner's detention is unconstitutionally indefinite, it is unlawful. Moreover, because Petitioner faces detention without any meaningful determination of whether circumstances have changed such that his removal is reasonably foreseeable, and whether he poses a danger or flight risk, his detention violates due process.

96. Petitioner's re-detention is unconstitutionally indefinite because he cannot be removed to Vietnam. Thus, his removal is not reasonably foreseeable in this case, and the government has not provided him with notice, evidence, or an opportunity to be heard on this issue either before arbitrarily re-detaining him. His continued detention without any reasonably foreseeable end point is thus unconstitutionally prolonged in violation of clear Supreme Court precedent. *Zadvydas v. Davis*, 533 U.S. at 701.

97. Moreover, because Petitioner poses no danger or flight risk, his detention was and is not reasonably related to its purposes, and is unlawful.

98. Further, because he was not provided with a hearing prior to his re-detention, and his continuing unlawful and constitutionally indefinite detention without adequate process is an ongoing violation of his due process rights, the only remedy of this violation is his immediate release from immigration detention, as well as a future hearing prior to any re-detention where DHS must prove that his detention is not unlawful.

FIFTH CAUSE OF ACTION

Procedural Due Process – Unconstitutionally Inadequate Procedures Regarding Third Country Removal

U.S. Const. amend. V

99. Petitioner re-alleges and incorporates herein by reference, as if set forth fully herein, the allegations in all the preceding paragraphs.

100. The Due Process Clause of the Fifth Amendment requires sufficient notice and an opportunity to be heard prior to the deprivation of any protected rights. U.S. Const. amend. V; *see also Louisiana Pacific Corp. v. Beazer Materials & Services, Inc.*, 842 F.Supp. 1243, 1252

(E.D. Cal. 1994) ("[D]ue process requires that government action falling within the clause's mandate may only be taken where there is notice and an opportunity for hearing.").

101. Petitioner has a protected interest in his life. Thus, prior to any third country removal, Petitioner must be provided with constitutionally-compliant notice and an opportunity to respond and contest that removal if he has a fear of persecution or torture in that country.

102. For these reasons, Petitioner's removal to any third country without adequate notice and an opportunity to apply for relief under the Convention Against Torture would violate his due process rights. The only remedy of this violation is for this Court to order that he not be summarily removed to any third country unless and until he is provided constitutionally adequate procedures.

PRAYER FOR RELIEF

WHEREFORE, the Petitioner prays that this Court grant the following relief:

(1) Assume jurisdiction over this matter;

(2) Order that Petitioner's detention is unlawful in violation of *Zadvydas* because his removal is not reasonably foreseeable;

(3) Order that Petitioner's detention is unlawful in violation of 8 C.F.R. § 241.13(i)(2) because there are no changed circumstances showing that there is a significant likelihood that he may be removed in the reasonably foreseeable future;

(4) Order the immediate release of Petitioner from custody because his detention is not reasonably foreseeable in violation of *Zadvydas*;

(5) Order the immediate release of Petitioner from custody because his detention is unlawful in violation of 8 C.F.R. § 241.13(i)(2);

(6) Order the immediate release of Petitioner from custody on any other basis that this Court finds proper;

(7) Order that, prior to any future re-detention, Petitioner is provided a hearing before an Immigration Judge where DHS bears the burden of justifying Petitioner's re-detention, and that the Immigration Judge must further consider

whether, in lieu of detention, alternatives to detention exist to mitigate any risk that DHS may establish;

(8) Order that Petitioner cannot be removed to any third country without first being provided constitutionally-compliant procedures, including:

a. Written notice to Petitioner and counsel of the third country to which he may be removed, in a language that Petitioner can understand, provided at least 21 days before any such removal;

b. A meaningful opportunity for Petitioner to raise a fear of return for eligibility for protection under the Convention Against Torture, including a reasonable fear interview before a DHS officer;

c. If Petitioner demonstrates a reasonable fear during the interview, DHS must move to reopen his underlying removal proceedings so that he may apply for relief under the Convention Against Torture;

d. If it is found that Petitioner does not demonstrate a reasonable fear during the interview, a meaningful opportunity, and a minimum of 15 days, for Petitioner to seek to move to reopen his underlying removal proceedings to challenge potential third-country removal;

(9) Award Petitioner reasonable costs and attorney fees; and

(10) Grant such further relief as the Court deems just and proper.

Dated: July 3, 2025

Respectfully submitted,

s/ Zachary Nightingale
Zachary Nightingale
Attorney for Petitioner

VERIFICATION PURSUANT TO 28 U.S.C. 2242

I am submitting this verification on behalf of the Petitioner because I am one of Petitioner's attorneys. I have discussed with the Petitioner the events described in the Petition. Based on those discussions, I hereby verify that the factual statements made in the attached Amended Petition for Writ of Habeas Corpus are true and correct to the best of my knowledge.

Executed on this July 3, 2025, in San Francisco, California.

/s/ Zachary Nightingale
Zachary Nightingale
Attorney for Petitioner