Zachary Nightingale (California Bar # 184501)
Christine Raymond, *Admitted Pro Hac Vice*
Van Der Hout LLP
360 Post Street, Suite 800
San Francisco, CA 94108
Telephone: (415) 981-3000
Fax: (415) 981-3003
Email: ndca@vblaw.com

Attorneys for Petitioner-Plaintiff
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 FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS

Challenge to Unlawful Incarceration; Request for Declaratory and Injunctive Relief

I. INTRODUCTION

As a result of the preliminary injunction granted by this Court (Dkt. 22), Mr. Phan was released from unlawful detention and has since returned home to reunite with his loved ones. However, the fact of Mr. Phan's release as a result of the preliminary injunction does not render each and every cause of action and claim in his underlying First Amended Petition for Writ of Habeas Corpus ("habeas petition") moot or unripe, as Respondents contend. Rather, there still exists a live case of controversy in this case because the interim relief provided by the preliminary injunction has not "completely and irrevocably eradicated the effects of the alleged violation." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (emphasis added).[1]

Specifically, Mr. Phan's claim that (1) due process requires that he be provided a pre-deprivation hearing prior to any future re-detention (stemming from cause of action number four) is not moot, nor is the claim that (2) due process requires that he be provided with constitutionally-compliant procedures prior to any third country removal (stemming from cause of action number five). Although this Court, in granting the preliminary injunction, ordered that Respondents are "ENJOINED AND RESTRAINED from re-detaining or removing Petitioner to a third country without notice and an opportunity to be heard," this relief is preliminary, not permanent. Dkt. 22. Thus, this case is not moot in its entirety because the Court can "nevertheless provide meaningful [and permanent] relief" as to these remaining claims. *Center for Biological Diversity v. Lohn*, 511 F.3d 960, 964 (2007); *see also Trump v. International Refugee Assistance Project*, 582 U.S. 571, 580 (2017) ("The purpose of...interim equitable relief is not to conclusively determine the rights of the parties...but to balance the equities as the litigation moves forward.") (internal citation omitted).

Moreover, Mr. Phan continues to seek related relief through the underlying habeas petition as follows:

> WHEREFORE, the Petitioner prays that this Court grant the following

[1] Mr. Phan concedes that, because he has been ordered released from unlawful detention as a result of the preliminary injunction, his causes of action regarding his unlawful detention, and the related relief sought regarding an order to release him, are moot.

relief:

[....]

(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.

Thus, the above claims in the pending habeas petition are not moot, and are ripe for adjudication. For these reasons, explained in further detail below, Mr. Phan respectfully requests that this Court grant his habeas petition and the remaining relief requested therein.

II. ARGUMENT[2]

a. Petitioner's claim that due process requires that he be provided a pre-deprivation hearing prior to any future re-detention is not moot.

Contrary to Respondents' assertion, the issuance of a preliminary injunction in this case does not resolve the underlying claim that principles of due process require that Mr. Phan be provided a pre-deprivation hearing before an Immigration Judge prior to any future re-detention. Respondents, in fact, appear to wholly ignore this claim in its answer to the habeas petition. *See* Dkt. 24.

A party asserting mootness carries a heavy burden to show that *no* effective relief remains for the Court to provide. *GATX/Airlog Co. v. United States District Court*, 192 F.3d 1304, 1306 (9th Cir. 1999). The conditions under which a suit will be found moot are stringent. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 170 (2000). A case will be deemed moot only when "interim relief or events have *completely and irrevocably* eradicated the effects of the alleged violation." *County of Los Angeles v. Davis*, 440 U.S. at 631 (emphasis added). Conversely, a case is not moot if the Court can "nevertheless provide meaningful relief." *Center for Biological Diversity v. Lohn*, 511 F.3d at 964. Moreover, even when "one issue in a case has become moot,...the case as a whole remains alive [where] other issues have not become moot." *University of Texas v. Camenisch*, 451 U.S. 390, 394 (1981).

Here, Mr. Phan's claim that he be provided a pre-deprivation hearing prior to any re-

---

[2] Respondents improperly fashion their answer to the First Amended Petition for Writ of Habeas Corpus as: Respondents' Response and Motion to Dismiss Petitioner's First Amended Petition Under 28 U.S.C. 2241 as Moot. Dkt. 24. The Court should reject the filing as a motion to dismiss, as Respondents have not filed a properly-noticed motion, and raising such a motion as part of an answering brief is improper. Fed. R. Civ. Pro. 12(f)(2).

detention is not moot because the preliminary injunction is not the final decision on this point, and this Court can still and should provide meaningful—and final, as opposed to preliminary—relief regarding this issue. *See Trump v. International Refugee Assistance Project*, 582 U.S. at 580 ("The purpose of…interim equitable relief is not to conclusively determine the rights of the parties….").

Further, even if this claim were moot, which it is not, it meets the exception to the mootness doctrine in that it is capable of repetition yet evading review. *Native Vill. of Noatak v. Blatchford*, 38 F.3d 1505, 1509 (9th Cir.1994). This is because there is a reasonable expectation that Mr. Phan will be subject to the same injury—unlawful detention—again,[3] and, if the Court were to follow Respondents' argument, the detention would be inherently limited in duration such that it is likely to become moot before federal court litigation is completed. *Id.* This is demonstrated, first and foremost, by that fact that Mr. Phan continues to attend his regular check ins at the San Francisco Office of U.S. Immigration and Customs Enforcement ("ICE") pursuant to his Order of Supervision. While the preliminary injunction in this case remains in place, Mr. Phan cannot be re-detained by ICE without notice and a hearing. Dkt. 22. However, if the Court were to follow Respondent's line of reasoning and find that this claim is moot, then the preliminary injunction and accompanying protections would dissolve upon the issuance of the final decision in this case, and Mr. Phan would once again be at risk of being unlawfully

[3] Reuters, "ICE's tactics draw criticism as it triples daily arrest targets" (June 10, 2025), available at: https://www.reuters.com/world/us/ices-tactics-draw-criticism-it-triples-daily-arrest-targets-2025-06-10/; The Guardian, "Trump administration sets quota to arrest 3,000 people a day in anti-immigration agenda" (May 29, 2025), available at: https://www.theguardian.com/us-news/2025/may/29/trump-ice-arrest-quota; Immigration Policy Tracking Project, "Reported: Administration officials direct ICE to increase arrests to meet daily quotas" (Jan. 28, 2025), available at: https://immpolicytracking.org/policies/report-ice-directed-to-increase-arrests-to-meet-daily-quotas/#/tab-policy-documents.

detained at one of his regular check ins, as he was in June 2025. Dkt. 15, ¶¶ 1, 6, 23, 32, 36. Mr. Phan could continue in this cycle of being unlawfully detained, then filing a habeas petition and accompanying motion for temporary restraining order seeking his release along with a pre-deprivation hearing prior to re-detention—but, per Respondents' faulty reasoning, if he were to be granted release through preliminary relief due to the unlawful nature of his detention, then the fact of his release would render his claim to a pre-deprivation hearing moot, and Mr. Phan would consequently *never* receive a final decision as to this claim. In this way, the claim would be capable of repetition, yet evading review, and would therefore meet this exception to the mootness doctrine.

For these reasons, Petitioner's claim that due process requires that he be provided with a pre-deprivation hearing before prior to any re-detention is not moot.

b. Petitioner's claim that due process requires that he be provided with constitutionally-compliant procedures prior to any third country removal is not moot and is otherwise ripe for adjudication.

Respondents' assertions that Mr. Phan's claim that he should be provided with constitutionally-compliant procedures prior to third country removal is either moot or unripe are likewise unavailing.

First, for the same reasons set out above, this claim is not moot because, again, the preliminary injunction is not the final decision on this point, and this Court can still and should still provide meaningful—and final, as opposed to preliminary—relief regarding this issue. If the Court does not provide a final decision on this issue, in fact, then Mr. Phan is at risk of summary removal to a third country, at which time he will no longer be able to bring this claim before a U.S. federal court—likely ever.

Second, this claim is ripe for adjudication by this Court because it is "certainly

impending," it is fit for judicial decision, and Mr. Phan will face hardship if the Court withholds consideration of this claim. *Thomas v. Union Carbide Agr. Products Co.*, 473 U.S. 568 (1985). As an initial matter, this unlawful action is "certainly impending" because the U.S. Department of Homeland Security ("DHS") issued a written policy on March 30, 2025, provided at Dkt. 16-4, Exhibit ("Exh.") E, which explicitly instructs DHS to, and how to, summarily remove individuals to third countries—without proper due process protections—when such individuals cannot be removed to the country designated in their removal order. This is briefed extensively in the First Amended Petition for Write of Habeas Corpus (Dkt. 15), the Motion for Temporary Restraining Order (Dkt. 16), and Petitioner-Plaintiff's Reply in Support of Motion for Temporary Restraining Order (Dkt 20).

On July 9, 2025, the U.S. Immigration and Customs Enforcement ("ICE") issued a written policy further implementing the March 30, 2025 DHS policy. Dkt. 20-1, Exh. A. And, since the issuance of the preliminary injunction in this case on July 16, 2025, yet further noncitizens have been summarily removed to third countries.[4] Because summary removal to a third country is certainly impending for Mr. Phan, he need not "await the consummation of threatened injury to obtain preventive relief." *18 Unnamed John Smith Prisoners v. Meese*, 871 F.2d 881, 883 (9th Cir.1989). In fact, waiting until the consummation of this threatened injury—

[4] Politico, "Trump launches next round of third country deportations with new flight to Eswatini" (July 16, 2025), available at: https://www.politico.com/news/2025/07/16/trump-third-country-deportations-eswatini-00455757 ("The Trump administration deported five migrants from Vietnam, Jamaica, Laos, Cuba and Yemen to the small Southern African nation of Eswatini on Tuesday…."); Associated Press, "Men deported by US to Eswatini in Africa will be held in solitary confinement for undetermined time" (July 18, 2025), available at: https://apnews.com/article/eswatini-united-states-trump-deportation-immigrants-a5853b16b7b275cbcbfe6caff87d0bb8; The Intercept, "State Dept: Trump's 'Third Countries' for Immigrants Have Awful Human Rights Records" (July 29, 2025), available at: https://theintercept.com/2025/07/29/trump-deport-immigrants-third-country-human-rights/.

summary third country removal—would mean that Mr. Phan would *never* be able to bring this claim before the federal court, as he would already be outside the United States and in a third country by that point.

Further, this claim is fit for judicial review because the issue is purely legal and does not require further factual development (given DHS's and ICE's stated policies), and the challenged action is final in this instance—again, given DHS's and ICE's stated policies. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126 (9th Cir. 2009); *see also Ass'n of Am. Med. Colls. v. United States*, 217 F.3d 770, 780 (9th Cir. 2000) ("Courts traditionally take a pragmatic and flexible view of finality" including by assessing "whether the administrative action is a *definitive statement* of an agency's position")[5] (emphasis added). Additionally, Mr. Phan will face hardship if the Court withholds adjudication of this claim as, again, he will not be able to bring this claim in the future upon the consummation of the threatened injury—summary third country removal—,because he would already be outside the United States and in a third country (where he may fear persecution or torture but had no opportunity to apply for fear-based relief) by that point.

Finally, Respondents also appear to argue that Mr. Phan has no standing as to this fifth cause of action regarding third country removals. While that argument is not fully briefed by Respondents, Mr. Phan clearly shows that he has standing as to this cause of action because he demonstrates: (1) a concrete and particularized injury in fact that is actual or imminent, and not

---

[5] Politico, "'We find another country': Homan says Trump administration looking to make deals with several countries to accept deportees" (July 11, 2025), available at: https://www.politico.com/news/2025/07/11/homan-says-white-house-hopes-to-forge-more-third-country-deals-in-wake-of-south-sudan-deportations-00448137 ("'When you've got countries that won't take their nationals back, and they can't stay here, we find another country willing to accept them,'" Homan said....").

conjectural or hypothetical, (2) causation between this injury and the conduct of Respondents, and (3) that the injury will likely be redressed through a favorable judicial decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

Here, Mr. Phan shows that third country removals are not only likely, but are in fact occurring pursuant to the stated policy of DHS and ICE. Dkt. 16-4, Exh. E; Dkt. 20-1, Exh. A. Mr. Phan has provided extensive briefing on and evidence in support of this issue, (Dkts. 15, 16, 20), yet Respondents still incorrectly maintain that third country removals are not occurring. Dkt. 24, p.2. To be sure, DHS's written policy explicitly instructs DHS to, and how to, summarily remove individuals to third countries—without proper due process protections—where they cannot be removed to the country designated in their removal order. Dkt. 16-4, Exh. E ("This memorandum clarifies DHS policy regarding the removal of aliens with final orders of removal…to countries other than those designated for removal in those removal orders (third country removals)….If the United States has received [diplomatic] assurances…the alien may be removed [to a third country] without the need for further procedures.").; Dkt. 20-1, Exh. A. ("Effective immediately, when seeking to remove an alien with a final order of removal…to an alternative country…ICE must adhere to Secretary of Homeland Security Kristi Noem's March 30, 2025 memorandum…."). As Mr. Phan cannot be repatriated to Vietnam,[6] he has established that he is at substantial risk of summary removal to a third country without first being provided with notice or an adequate opportunity to apply for fear-based relief as to any third country—*in accordance with the stated policy of DHS and ICE. Id.*; *see also Susan B. Anthony List v.*

[6] U.S. Department of State, "Repatriation Agreement Between the United States of America and Vietnam" (Jan. 22, 2008), available at: https://www.state.gov/wpcontent/uploads/2019/02/08-322-Vietnam-Repatriations.pdf.

Driehaus, 573 U.S. 149, 158 (2014) ("An allegation of future injury may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur.") (quoting *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 416 n.5 (2013)) (internal quotations omitted). Mr. Phan clearly meets the other elements of standing, as the injury in fact of summary third country removal will be inflicted by Respondents (per DHS's stated policy), and a favorable decision with this Court would ensure that Mr. Phan cannot be summarily removed to a third country without first being provided constitutionally-compliance procedures.

Thus, Mr. Phan has standing to pursue his claim that he be provided constitutionally-adequate procedures (notice and an opportunity to apply for fear-based relief) prior to any third country removal, and this claim is not otherwise moot or unripe.

III. CONCLUSION

For all the aforementioned reasons, the Court should grant Mr. Phan's pending habeas petition by adjudicating the remaining claims, which are live and ripe for decision, and addressing the remaining relief sought in a final decision.

Dated: August 4, 2025

Respectfully submitted,

/s/ Christine Raymond
Christine Raymond
Zachary Nightingale
Attorneys for Petitioner-Plaintiff