IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BAO PHONG HUU NGUYEN PETITIONER, v. KRISTI NOEM, et al., RESPONDENTS.	Civil Case No. 3:25-cv-1913-L

PETITIONER'S AMENDED EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

Petitioner, Bao Nguyen, by and through undersigned counsel, files this amended[1] emergency motion for a Temporary Restraining Order ("TRO") and/or a Preliminary Injunction. Mr. Nguyen, a pre-1995 Vietnam immigrant, seeks an immediate order compelling Respondents to release him from the custody of U.S. Immigration and Customs Enforcement ("ICE"). Mr. Nguyen asks this Court to order Respondents to respond within 24 hours and set this matter for an evidentiary hearing.

INTRODUCTION

Petitioner Nguyen faces immediate irreparable harm absent this Court's intervention. He is experiencing unlawful prolonged immigration detention and, as a pre-1995 Vietnamese refuge with a 24-year-old removal order, he faces a real and imminent threat of removal to a third country in violation of his statutory and constitutional rights.

---

[1] Mr. Nguyen filed his initial emergency motion for a TRO and/or preliminary injunction on July 24, 2025. ECF 2. This filing is intended to amend his initial motion.

He respectfully asks this Court to order his release, enjoin Respondents from removing him to a third country without affording him his statutory and constitutional rights in re-opened removal proceedings. and enjoin Respondent from removing him to a third country for a punitive purpose and effect.

STATEMENT OF FACTS

Mr. Nguyen is a 49-year-old devoted husband to a U.S. citizen, a loving father to three U.S. citizen children, and a respected, hardworking member of his community.[2] He has lived in the United States since 1985, when he arrived as a refugee from Vietnam. For the past 24 years, Mr. Nguyen has lived a quiet, law-abiding life under an OSUP. He has never violated his OSUP and has no criminal record for over a quarter of a century.

Mr. Nguyen's only criminal history is a state charge of possession of a controlled substance from 1998—27 years ago. In 2001, he was taken into ICE custody for removal proceedings which resulted in a final order of removal on September 10, 2001.[3] After the former INS determined Mr. Nguyen's removal was not reasonably likely in the foreseeable future, he was released on an OSUP in December 2001. Since his release, Mr. Nguyen has dutifully complied with his supervision requirements, including timely appearances for all his scheduled check-ins.

On July 23, 2025, Mr. Nguyen did exactly what he has done for years: he appeared at the ICE-ERO Dallas Field Office ("DFO") for his scheduled annual check-in. Without

---

[2] (Pet'r's App. Ex. 9)

[3] (Pet'r's App. Ex. 8.)

warning, explanation, or any lawful basis, ICE agents detained him. Respondents did not identify any new criminal activity, any violation of his supervision, or any change in circumstances that would suddenly make his removal to Vietnam—a diplomatic improbability for pre-1995 arrivals like him—reasonably foreseeable.

Since his unlawful seizure, Mr. Nguyen has been held in deplorable and dangerous conditions. He was initially warehoused in the DFO, an office building with a small processing area designed for temporary holding of no more than 12 hours. Since that time, he has been moved to the Prairieland Detention Facility in Alvarado, Texas to be indefinitely held.

His removal to Vietnam is not reasonably foreseeable at this time. There has been no evidence that travel documents have been obtained on his behalf. His continued, indefinite detention is unlawful and must be remedied through immediate relief.

LEGAL STANDARD

The purpose of a TRO is to preserve the status quo and prevent irreparable harm until the court makes a final decision on injunctive relief.[4] To obtain a TRO, an applicant must establish four elements: (1) substantial likelihood of success on the merits; (2) substantial threat of irreparable harm; (3) the threatened injury outweighs any harm the

[4] *Granny Goose Foods, Inc. v. Bhd. Of Teamsters & Auto Truck Drivers Loc. No. 70 of Alameda Cnty.*, 415 U.S. 423, 439 (1974).

order might cause the defendant; and (4) the injunction will not disserve the public interest.[5]

I. Mr. Nguyen Is Likely to Succeed on the Merits of his Claims.

A. Mr. Nguyen Is Likely to Succeed on the Merits of His Claim that His Re-Detention is Unconstitutional and Unlawful.

Mr. Nguyen is likely to succeed on the merits of his claim that his re-detention violates the Due Process Clause, 8 U.S.C. § 1231(a) and governing regulations.

i. His Detention Violates Due Process.

Noncitizens are entitled to due process of the law under the Fifth Amendment.[6] To determine whether a civil detention violates a detainee's due process rights, courts apply the three-part test set forth in *Matthews v. Eldridge*, 424 U.S. 319 (1976). Pursuant to *Matthews*, courts weight the following factors:

> (1) the private interest that will be affected by the official action;
>
> (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and
>
> (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[7]

Mr. Nguyen addresses the *Matthews* factors in turn.

---

[5] *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see Enrique Bernat F., S.A. v. Guadalajara, Inc.*, 210 F.3d 439, 442 (5th Cir. 2000).

[6] *Demore v. Kim*, 538 U.S. 510, 523 (2003).

[7] *Matthews*, 424 U.S. at 335.

Private interest. It is undisputed Mr. Nguyen has a significant private interest in being free from detention. "The interest in being free from physical detention" is "the most elemental of liberty interests."[8] Moreover, when assessing the private interest, courts consider the detainee's conditions of confinement, namely, "whether a detainee is held in conditions indistinguishable from criminal incarceration."[9]

Mr. Nguyen has been held in ICE detention for over 60 days—since July 23, 2025. This re-detention comes after being held in ICE custody for approximately a year over two decades ago. As in *Günaydin*, "he is experiencing all the deprivations of incarceration, including loss of contact with friends and family, loss of income earning, . . . lack of privacy, and, most fundamentally, the lack of freedom of movement."[10] The first *Matthews* factor supports Mr. Nguyen's claim of a Fifth Amendment violation.

Risk of erroneous deprivation. Under this factor, courts must "assess whether the challenged procedure creates a risk of erroneous deprivation of individuals' private rights and the degree to which alternative procedures could ameliorate these risks."[11] ICE's re-detention of Mr. Nguyen is the only reason that he is currently being detained. If Mr. Nguyen is released from custody, ICE has alternatives, too. ICE officials can continue to pursue obtaining travel documents from Vietnam in an effort to formally remove him from

---

[8] *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004).

[9] *Günaydin v. Trump*, No. 25-cv-01151 (JMB/DLM), 2025 WL 1459154, at *7 (D. Minn. May 21, 2025) (citing *Hernandez-Lara v. Lyons*, 10 F.4th 19, 27 (1st Cir. 2021); *Velasco Lopez v. Decker*, 978 F.3d 842, 851 (2d Cir. 2020)).

[10] *Id.*

[11] *Id.* at *8.

the country—Mr. Nguyen does not need to be in custody for this to happen. This *Matthews* factor weighs in favor of Mr. Nguyen, too.

Respondents' competing interests. Under this factor, the court weighs the private interests at stake and the risk of erroneous deprivation of those interests against Respondents' interests.[12] Mr. Nguyen does not dispute that the government and the public have a strong interest in the enforcement of the immigration laws. But he does not need to be detained while ICE works out whether he can be removed. Mr. Nguyen does not present a danger to society as evidenced by his over two decades on OSUP with no issues. Mr. Nguyen is also not a flight risk because he has strong family ties to the area.

Because all three *Matthews* factors favor Mr. Nguyen's position, this Court should determine that Mr. Nguyen is likely to succeed in demonstrating that his re-detention contravenes his due process rights under the Fifth Amendment.[13]

ii. His Detention Violates Governing Regulations.

The INA provides that after a removal order becomes final, the government "shall remove the alien from the [U.S.] within a period of 90 days."[14] This 90-day period is often referred to as the initial removal period and during it, the government "shall detain the alien."[15] In some circumstances, federal immigration authorities can continue to detain an

---

[12] *Matthews*, 424 U.S. at 335.

[13] *See Martinez v. Secretary of Noem*, No. 5:25-cv-01007-JKP, 2025 WL 2598379, at *1 (W.D. Tex. Sept. 8, 2025).

[14] 8 U.S.C. § 1231(a)(1)(A).

[15] *Id.* at § 1231(a)(2).

alien beyond the initial removal period. Specifically, section 1231(a)(6) allows the government to detain certain enumerated classes of immigrants—including those ordered removed due to criminal convictions—for more than 90 days.[16]

The Supreme Court, in *Zadvydas v. Davis*, 533 U.S. 678 (2001), rejected the government's position that § 1231(a)(6) permitted indefinite detention following the initial removal period. It held that "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem" because it would become punitive.[17] "[G]overnment detention violates [the Fifth Amendment's Due Process Clause] unless the detention is ordered in a criminal proceeding with adequate procedural protections."[18] The Court held that § 1231(a)(6) "implicitly limits an alien's detention to a period reasonably necessary to bring about that alien's removal."[19] Thus, "once removal is no longer reasonably foreseeable, continued detention is no longer authorized by [§ 1231(a)(6)]."[20] "[F]or the sake of uniform administration in the federal courts," the Court found that post-removal detention was "presumptively reasonable" for the first six months.[21] After that "presumptively reasonable" six-month period ends, once the noncitizen "provides good reason to believe that there is no significant likelihood of removal in the reasonably

---

[16] *Id.* at § 1231(a)(6).

[17] *Zadvydas*, 533 U.S. at 690.

[18] *Id.*

[19] *Id.* at 679.

[20] *Id.* at 699.

[21] *Id.* at 700-01.

foreseeable future, the Government must respond with evidence sufficient to rebut that showing. And for detention to remain reasonable, as the period of prior post-removal confinement grows, what counts as the 'reasonably foreseeable future' conversely would have to shrink."[22]

Upon release from custody, a noncitizen subject to a final order of removal must comply with certain conditions of release.[23] The revocation of that release is governed by 8 C.F.R. § 241.13(i), which authorizes ICE to revoke a noncitizen's release for purposes of removal. ICE may revoke a noncitizen's release and return them to ICE custody due to failure to comply with any of the conditions of release,[24] or if, "on account of changed circumstances, [ICE] determines that there is a significant likelihood that the [noncitizen] may be removed in the reasonably foreseeable future."[25]

Upon such a determination by ICE to re-detain, "the alien will be notified of the reasons for revocation of his or her release. [ICE] will conduct an initial informal interview promptly after his or her return to [ICE] custody to afford the alien an opportunity to respond to the reasons for revocation stated in the notification. The [noncitizen] may submit any evidence or information that he or she believes shows there is no significant likelihood he or she [will] be removed in the reasonably foreseeable future, or that he or she has not violated the order of supervision. The revocation custody review will include an evaluation

---

[22] *Id.* at 701.

[23] 8 U.S.C. § 1231(a)(3), (6).

[24] 8 C.F.R. § 241.13(i)(1).

[25] *Id.* at § 241.13(i)(2).

of any contested facts relevant to the revocation and a determination whether the facts as determined warrant revocation and further denial of release."[26]

ICE's decision to re-detain is governed by the factors laid out in 8 C.F.R. § 241.13(f), including "the history of the [noncitizen's] efforts to comply with the order of removal, the history of [ICE's] efforts to remove [noncitizens] to the country in question or to third countries, including the ongoing nature of [ICE's] efforts to remove [the noncitizen] and the [noncitizen's] assistance with those efforts, the reasonably foreseeable results of those efforts, and the views of the Department of State regarding the prospects for removal of [noncitizens] to the country or countries in question."[27]

Mr. Nguyen's re-detention violates these regulations for a litany of reasons.

First, Mr. Nguyen's removal to Vietnam is not reasonably foreseeable. Respondents had not requested a travel document from Vietnam before they detained Petitioner. "Respondents intent to complete a travel document request for Petitioner does not make it significantly likely he will be removed in the foreseeable future" or constitute a changed circumstance.[28]

As Petitioner is a pre-1995 immigrant, there is no evidence that Vietnam is likely to issue a travel document. Indeed, as several courts have recently pointed out, there is no

---

[26] *Id.* at § 241.13(i)(3).

[27] *See Phan v. Beccerra*, No. 2:25-CV-01757, 2025 WL 1993735, at *3 (E.D. Cal. July 16, 2025); *see also Hoac v. Beccerra, et al.*, No. 2:25-CV-01740-DC-JDP, 2025 WL 1993771, at *3 (E.D. Cal. July 16, 2025); *Nguyen v. Hyde*, No. 25-CV-11470-MJJ, 2025 WL 1725791, at *3 (D. Mass. June 20, 2025).

[28] *Phan*, 2025 WL 1993735, *5; *see Liu v. Carter*, No. 25-cv-03036-JWL, 2025 WL 1696526, at *2 (D. Kan. June 17, 2025).

evidence that Vietnam is accepting any pre-1995 deportees at greater rates that would make removal significantly likely in the reasonably foreseeable future.[29] The mere existence of the 2020 MOU is "not enough to show that a changed circumstance had occurred."[30]

Moreover, the government's unsuccessful efforts in the past to remove Petitioner, which deprived him of a year of his liberty in immigration detention, make Respondents re-detention of him now, without any likely prospect of removal to Vietnam, even more unreasonable.[31] Moreover, 24 years have gone by since Petitioner was ordered removed, diminishing the prospect of removal even further.[32]

Second, Petitioner can show that Respondents did not comply with the procedural requirements of 8 C.F.R. § 241.13(i) in revoking his release. ICE is required to follow its own regulations.[33] "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required."[34]

---

[29] *See, e.g., Hoac v. Becerra*, No. 25-cv-01740-DC-JDP, 2025 WL 1993771, at *5 (E.D. Cal. July 16, 2025) (adopting the court's analysis in *Nguyen v. Hyde*, 2025 WL 1725791, at *4, and concluding there was "no evidence regarding the percentage of successful requests to Vietnam to demonstrate changed circumstances"); *Phan*, 2025 WL 1993735, at *4 (same).

[30] *Hoac*, 2025 WL 1993771, at *4; *see Nguyen*, 2025 WL 1725791, at *4 (same).

[31] *See Zadvydas*, 533 U.S. at 701 ("as the period of prior post-removal confinement grows, what counts as the 'reasonably foreseeable future' conversely would have to shrink").

[32] *See, e.g., Tadros v. Noem*, No. 25-cv-4108-EP, 2025 WL 1678501, at *3 (D.N.J. June 13, 2025) ("Tadros has demonstrated there is no significant likelihood of his removal in the reasonably foreseeable future because fifteen years have gone by without the Government securing. . . his removal.").

[33] *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954); *see Alcaraz v. INS*, 384 F.3d 1150, 1162 (9th Cir. 2004) ("The legal proposition that agencies may be required to abide by certain internal policies is well-established.").

[34] *Morton v. Ruiz*, 415 U.S. 199, 235 (1974).

As discussed, no "changed circumstances" make it significantly likely that Petitioner will be removed in the foreseeable future.[35] ICE did not notify Petitioner of the "reasons for revocation of his [] release," conduct "an initial informal interview promptly after his. . . return to [ICE] custody to afford [him] an opportunity to respond to the reasons for revocation stated in the notification," allow Petitioner to "submit any evidence or information that he or she believes shows there is no significant likelihood he or she [will] be removed in the reasonably foreseeable future," or provide a written "revocation custody review."[36] Moreover, ICE did not consider the factors in § 241.13(f) that govern the decision to re-detain.

Accordingly, Petitioner is likely to succeed on his claim that his re-detention was unlawful, as several courts have recently held in pre-1995 Vietnamese re-detention cases presenting similar facts.[37]

B. Petitioner Is Likely to Succeed on the Merits of His Claim That He Is Entitled to Legally Required Procedures Prior to Any Nonpunitive Third Country Removal.

Petitioner Nguyen is likely to succeed on the merits of his claim that he may not be removed to a third country absent Respondents following the legally required multistep procedures set out in 8 U.S.C. § 1231(b) and required by due process.

---

[35] 8 C.F.R. § 241.13(i)(2).

[36] *Id.* at § 241.13(i)(3); *see also Phan*, 2025 WL 1993735, at *3.

[37] *See Phan*, 2025 WL 1993735; *Hoac*, 2025 WL 1993771; *Nguyen v. Hyde*, 2025 WL 1725791.

In Petitioner's case, no country other than Vietnam meets the criteria for removal under 8 U.S.C. § 1231(b)(2)(A)-(E). Moreover, to remove Petitioner to a third country, the statute requires that the Attorney General—here, an immigration judge—first determine that it is "impracticable, inadvisable, or impossible" to remove Petitioner to Vietnam and that the designated third country "will accept [Petitioner] into that country."[38] It is the immigration judge, not DHS, that the statute authorizes to designate a third country for removal.[39] Here, to remove Petitioner to a third country would require Respondents to move to reopen Petitioner's 24-year-old removal proceedings to ask an IJ to designate a third country under the statutory process.[40]

Adherence to that process also ensures Petitioner's statutory right to claim protection in immigration court against removal to a third country where he may be

---

[38] 8 U.S.C. § 1231(b)(2)(E)(vii); *see Himri v. Ashcroft*, 378 F.3d 932, 939 n. 4 (9th Cir. 2004) (8 U.S.C. § 1231(b)(E)(vii) "indisputably requires the Attorney General to prove that the proposed country of removal is willing to accept the alien"); *see also Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 344 (2005).

[39] 8 U.S.C. § 1231(b)(2)(E)(vii) ("the Attorney General shall remove the alien to. . ."); see also 8 C.F.R. § 1240.10(f) (in removal proceedings the immigration judge "shall. . .identify for the record a country, or countries in the alternative, to which the alien's removal may be made").

[40] *See, e.g., Sadychov v. Holder*, 565 F. App'x 648, 651 (9th Cir. 2014) (unpublished) (holding that should a new country of removal be designated, "the agency must provide [the noncitizen] with notice and an opportunity to reopen his case for full adjudication of his claim of withholding of removal from" the third country); *Aden v. Nielsen*, 409 F. Supp. 3d 998, 1009, 1011 (W.D. Wash. 2019) (finding that removal proceedings "shall be reopened and a hearing shall be held before the immigration judge so that petitioner may apply for relief from removal" as to a country not designated in prior proceedings).

persecuted or tortured, a form of protection known as withholding of removal,[41] as well as his right to claim deferral of removal under the Convention Against Torture ("CAT").[42]

Of course, the statutory framework is entirely meaningless without meaningful notice of a third country removal and an opportunity to respond that comports with Fifth Amendment due process.[43] Notice cannot be "last minute" because that would deprive an individual of a meaningful opportunity to apply for fear-based protection from removal.[44] Individuals must have time to prepare and present relevant arguments and evidence and to seek reopening of their removal case. "[W]ritten notice of the country being designated" is required and "the statutory basis for the designation, i.e., the applicable subsection of § 1231(b)(2)" must be specified.[45]

Due process also demands that the government "ask the noncitizen whether he or she fears persecution or harm upon removal to the designated country and memorialize in writing the noncitizen's response. This requirement ensures DHS will obtain the necessary

---

[41] 8 U.S.C. § 1231(b)(3)(A); *see also* 8 C.F.R. §§ 208.16, 1208.16.

[42] *See* 28 C.F.R. § 200.1 ("A removal order . . . shall not be executed in circumstances that would violate [the CAT]"); 8 C.F.R. §§ 208.17-18; 1208.17-18.

[43] *See D.V.D.*, 145 S. Ct. at 2163 (Sotomayor, J., dissenting) ("[t]he Fifth Amendment unambiguously guarantees that right" to notice of a third country removal so that a noncitizen "learn[s] about it in time to seek an immigration judge's review").

[44] Andriasian v. INS, 180 F.3d 1033, 1041 (9th Cir. 1999).

[45] *Aden*, 409 F. Supp. 3d at 1019; *see also D.V.D. v. U.S. Dep't of Homeland Sec.*, No. 25-cv-10676-BEM, 2025 WL 1453640, at *1 (D. Mass. May 21, 2025) ("All removals to third countries, i.e., removal to a country other than the country or countries designated during immigration proceedings as the country of removal on the non-citizen's order of removal, must be preceded by written notice to both the non-citizen and the non-citizen's counsel in a language the non-citizen can understand." (internal citation omitted)); *Andriasian*, 180 F.3d at 1041 (due process requires notice to the noncitizen of the right to apply for asylum and withholding to the country where they will be removed).

information from the noncitizen to comply with § 1231(b)(3) and avoids [a dispute about what the officer and noncitizen said]."[46]

Respondents' third country removal program skips over these statutory and constitutional procedural protections. According to ICE's July 7 guidance, individuals can be removed to third countries "without the need for further procedures," so long as "the [U.S.] has received diplomatic assurances." Petitioner is likely to succeed on the merits of his claim on this fact alone, because the policy instructs officers to violate the statutory and constitutional requirements. The same is true of the minimal procedures ICE offers when no diplomatic assurances are present. The policy provides no meaningful notice (6-24 hours), instructs officers not to ask about fear, and provides no actual opportunity to see counsel and prepare a fear-based claim (6-24 hours), let alone reopen removal proceedings. In sum, it directs ICE officers to violate the rights of those whom they seek to subject to the third country removal program.

Several courts have recently granted individual TROs against removal to third countries under similar circumstances.[47]

C. Petitioner Is Likely to Succeed on the Merits of His Claim That the Constitution Prohibits Punitive Third Country Removals.

---

[46] *Aden*, 409 F. Supp. 3d at 1019.

[47] *See generally J.R. v. Bostock*, 25-cv-01161-JNW, 2025 WL 1810210 (W.D. Wash. Jun. 30, 2025) (immediately enjoining removal to "Cuba, Libya, or any third country in the world absent prior approval from this Court"); *Phan*, 2025 WL 1993735, at *7 (enjoining Respondents from "re-detaining or removing Petitioner to a third country without notice and an opportunity to be heard"); *Hoac*, 2025 WL 1993771, at *7 (same); *Vaskanyan v. Janecka*, 25-cv-01475-MRA-AS, 2025 WL 2014208 (C.D. Cal. Jun. 25, 2025); *Ortega v. Kaiser*, 25-cv-05259-JST, 2025 WL 1771438 (N.D. Cal. June 26, 2025).

Mr. Nguyen is likely to succeed on the merits of his claim that the Constitution prohibits him from being subjected to Respondents' punitive third country removal program. The prohibition against imposing punitive measures on an individual subject to a final order of removal is as old as immigration law.[48] In *Wong Wing*, the Supreme Court struck down a provision of the Chinese Exclusion Act that imposed one year of imprisonment at hard labor as an immigration sanction before their deportation.[49] The Court drew a distinction between "deportation," which it described as a sanction for failure to comply with the legal requirements of residency in the U.S. that may be imposed by executive authorities, and "punishment," which may not.[50] The Court held that the government could not attach a punishment to deportation—here, imprisonment—without criminal charges, a judicial trial, and the concomitant protections of the Fifth, Sixth and Eighth Amendments.[51]

The government's third country removal program defies 130 years of constitutional immigration law between civil penalty and infamous punishment.[52] Respondents' third country removal program is designed to punish those it deports by subjecting them to imprisonment upon their arrival in the receiving countries. Respondents' program is not simply about removing individuals to third countries. It is about removing them to be

---

[48] *Wong Win v. United States*, 163 U.S. 228 (1896).

[49] *Id.* at 237.

[50] *Id.* at 236-37.

[51] *Id.*

[52] See, e.g., Zadvydas, 533 U.S. at 694.

imprisoned upon arrival and paying countries to carry out said imprisonment; selecting countries and overseas prisons (like CECOT and Guantanamo) notorious for cruelty, torture, lawlessness, and other human rights abuses; and broadcasting these third country removals across public media platforms to demonize the deportees and strike extreme fear in the immigrant community that people self-deport. This program is about punitive banishment.

To determine whether a given sanction constitutes punishment, courts look to intent. If the government's intent is to punish, "that is the end of the inquiry."[53] Here, the government's own statements show intent to deport individuals, particularly those with criminal convictions, into situations of forever confinement or substantial harm.

When the government's intent to punish is unclear, courts move to the second step of the inquiry to determine whether the practices are "so punitive either in purpose or effect as to negate the [government's] intention to deem it civil."[54] To determine punitive purpose or effect, courts often turn to the factors laid out in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).[55] Those factors are: "[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote

---

[53] *Am. Civ. Liberties Union of Nevada v. Masto*, 670 F.3d 1046, 1053 (9th Cir. 2012) (citing *Smith v. Doe*, 538 U.S. 84, 92 (2003)).

[54] *Id.* (quoting *Smith*, 538 U.S. at 92).

[55] *See also Hudson v. United States*, 522 U.S. 93, 99 (1997) ("the factors listed in *Kennedy v. Mendoza-Martinez* [] provide useful guideposts.").

the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned."[56]

Under these factors, the government's third country removal program undeniably constitutes punishment, as each factor is met. For example, under the first factor, the government's practices of deporting people only to have them imprisoned or subjected to other forms of physical harm, is an "affirmative disability or restraint." The "paradigmatic affirmative disability" is the "punishment of imprisonment."[57] Moreover, under this factor, "we inquire how the effects of the [sanction] are felt by those subject to it. If the disability or restraint is minor and indirect, its effects are unlikely to be punitive."[58] There can be no question that being deported to a country to be imprisoned or experience other extreme harm will be felt as a significant and direct disability or restraint.

The second factor is also satisfied. "[D]evices of banishment and exile have throughout history been used as punishment."[59] In 1791, the year the Bill of Rights was ratified, deportation was exclusively used and understood as punishment.[60] Banishment

---

[56] *Mendoza-Martinez*, 372 U.S. at 168-69 (footnotes omitted).

[57] *Smith*, 538 U.S. at 100.

[58] *Id.* at 99-100.

[59] *Mendoza-Martinez*, 372 U.S. at 168 n.23.

[60] *Fong Yue Ting v. U.S.*, 149 U.S. 698, 740-41 (1893) (Brewer, J. dissenting) (citing President James Madison); *see id.* at 740 ("[I]t needs no citation of authorities to support the proposition that deportation is punishment. Every one knows that to be forcibly taken away from home and family and friends and business

as a form of punishment dates to ancient times and was used on citizens and noncitizens alike.[61]

The fourth factor, whether it promotes the traditional aims of punishment—retribution and deterrence, is also satisfied. The government's own statements make clear that its goals are retribution and deterrence to encourage people to leave the country on their own. As DHS Secretary Kristi Noem stated, "President Trump and I have a clear message to criminal illegal aliens: LEAVE NOW. If you do not leave, we will hunt you down, arrest you, and you could end up in this El Salvadorian prison." The Supreme Court has made clear that such "general deterrence" justifications are impermissible absent criminal process.[62]

The program satisfies the third, fifth, sixth and seventh factors too because Respondents have designed this program specifically for those being deported for criminal convictions, there is no logical nonpunitive rationale for deporting people into dangerous conditions of imprisonment or other harm, and the program is designed to be patently excessive in relation to the purpose of simply removing people from the country.

---

and property, and sent across the ocean to a distant land, is punishment, and that oftentimes most severe and cruel.").

[61] Peter L. Markowitz, Deportation is Different, 13 U. Pa. J. Const. L. 1299, 1308-09 (2011) (tracing the use of banishment from medieval England through colonial America).

[62] *See Kansas v. Crane*, 534 U.S. 407, 412 (2002) (warning that civil detention may not "become a 'mechanism for retribution or general deterrence'—functions properly those of criminal law, not civil commitment" (quoting *Kansas v. Hendricks*, 521 U.S. 346, 373 (1997) (Kennedy, J., concurring) (emphasis added)); *see Hendricks*, 521 U.S. at 373 (Kennedy, J. concurring) ("[W]hile Secretary Kristi Noem (@sec_noem), Instagram (Mar. 27, 2025), https://www.instagram.com/p/DHtVvbgsHhh/ incapacitation is a goal common to both the criminal and civil systems of confinement, retribution and general deterrence are reserved for the criminal system alone.").

II. Mr. Nguyen Faces Immediate and Irreparable Harm.

A movant "must show a real and immediate threat of future or continuing injury apart from any past injury."[63] Continued unlawful detention is, by its very nature, an irreparable injury. The Supreme Court has affirmed that "[f]reedom from imprisonment . . . lies at the heart of the liberty" protected by the Due Process Clause.[64] Each day Mr. Nguyen remains in custody, he is irreparably harmed by the loss of his fundamental liberty, his separation from his U.S. citizen wife and three children, and the loss of his ability to provide for his family.

The harm is not merely abstract. Mr. Nguyen has already faced over a year in prolonged immigration detention following the issuance of his removal order. Now Mr. Nguyen is being indefinitely held again. Absent relief, Mr. Nguyen will remain detained in an indefinite and prolonged state, denied his liberty, removed from his livelihood, separated and unable to care for his family, and removed from his community where he belongs.

III. The Balance of Equities and Public Interest Weighs in Mr. Nguyen's Favor.

The final two factors for a preliminary injunction—the balance of hardships and public interest—"merge when the Government is the opposing party."[65] Here, the balance of hardships weighs overwhelmingly in Mr. Nguyen's favor. The injury to Mr. Nguyen—unconstitutional detention, family separation, and risk to his well-being—is severe and

---

[63] *Aransas Project v. Shaw*, 775 F.3d 641, 648 (5th Cir. 2014).

[64] *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

[65] *Nken v. Holder*, 556 U.S. 418, 435 (2009).

immediate. Moreover, it is always in the public interest to prevent violations of the U.S. Constitution and ensure the rule of law.[66]

Conversely, the harm to Respondents is nonexistent. Mr. Nguyen is not a danger to the community; he has lived peacefully and productively for decades. He is not a flight risk; he has complied with his OSUP for 24 years and reported to ICE on July 23, 2025, fully aware that he would likely be detained. As the Supreme Court noted in *Zadvydas*, the flight risk justification is "weak or nonexistent where removal seems a remote possibility."[67] Releasing Mr. Nguyen to his OSUP, a status ICE itself deemed appropriate for over two decades, poses no conceivable harm to the government. Any administrative burden imposed of Respondents by halting re-detention is minimal and far outweighed by the substantial harm Mr. Nguyen continues to face.[68] Furthermore, the public interest is served by preserving family unity, especially where U.S. citizen children are involved, and by preventing the waste of taxpayer resources on unlawful and indefinite detention.

IV. Granting Injunctive Relief Would Maintain the Status Quo.

Mr. Nguyen seeks injunctive relief to maintain the status quo by barring ICE from removing him to a third county. Several district courts have recently concluded that releasing a re-detained noncitizen who had been on supervised release preserves rather than

---

[66] *Id.* at 436 (describing public interest in preventing noncitizens "from being wrongfully removed, particularly to countries where they are likely to face substantial harm"); *see also Rosa v. McAleenan*, 583 F. Supp. 3d 840 (S.D. Tex. 2019).

[67] *Zadvydas*, 533 U.S. at 691.

[68] *See Martinez*, 2025 WL 2598379, at *5.

alters the status quo.[69] The status quo ante litem is "the last uncontested status which preceding the pending controversy." For Mr. Nguyen, this would be back out on OSUP where he has been complaint for 24 years. There is no reason to think he would not comply now. Injunctive relief is therefore appropriate.

CONCLUSION

For the foregoing reasons. Petitioner Bao Nguyen respectfully requests that the Court immediately grant this amended motion and issue a Temporary Restraining Order and/or Preliminary Injunction ordering his immediate release from ICE custody under his previous Order of Supervision, pending a final resolution of his Petition for a Writ of Habeas Corpus

1. GRANT this Emergency Motion;
2. ISSUE a Temporary Restraining Order immediately ENJOINING and RESTRAINING Respondents, their officers, agents, servants, employees, and all persons in active concert or participation with them, from continuing to detain Mr. Nguyen and from removing to any third country (i.e. any country that is not Vietnam) without providing Mr. Nguyen, his counsel, and the Court with at least 72-hours' notice of its intent to do so;
3. ORDER Respondents to appear and show cause immediately as to why a Preliminary Injunction should not issue;

---

[69] *Nguyen v. Scott*, 2025 WL 2419288, at *10 (W.D. Wa. Aug. 21, 2025) (citing *Phong Phan v. Moises Beccerra*, No. 2:25-cv-01757-DC-JDP, 2025 WL 1993735, at *6 (E.D. Cal. July 16, 2025); *Pinchi v. Noem*, No. 25-cv-05632-RMI-RML, 2025 WL 1853763, at *3 (N.D. Cal. July 4, 2024) (finding the "moment prior to the Petitioner's likely illegal detention" was the status quo).

4. Set an Emergency Hearing at the Court's Convenience; and

5. GRANT Petitioner such other and further relief as the Court may deem just and proper.

RESPECTFULLY SUBMITTED.
/s/ Dan Givideń

Dan Givideń
Texas State Bar No. 24075434
18208 Preston Rd., Ste. D9-284
Dallas, TX 75252
972-256-8641
Dan@GividenLaw.com