THE HONORABLE TIFFANY M. CARTWRIGHT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

Phong Thanh Nguyen,

Petitioner,

v.

Bruce SCOTT, *et al.*

Respondents.

Civil Case No. 2:25-cv-01398-TMC-SKV

REPLY IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

Hearing Set: August 14, 2025

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I. INTRODUCTION

The government does not have unbounded authority to re-detain a previously released individual who is removable or to remove them to a third country, including where they may be imprisoned indefinitely upon arrival. Its authority is constrained by the statute, regulations, and the Constitution, all designed to protect Petitioner Phong Nguyen's vital liberty interests. Twenty-one years ago, the government released Petitioner from custody because it could not effectuate his removal to Vietnam. Since then, Petitioner dutifully complied with the conditions of his supervised release. More than that, he has lived a productive adult life, as a cherished long-term employee at a local plumbing company and as a caretaker for his elderly parents and his medically fragile and disabled adult child. Rather than adhere to legal process, Respondents have re-detained Petitioner without notice, a hearing, or any legally required justification, and subjected him to a third country removal policy and practice that patently violates governing law. They have stripped him of his most basic liberty and subjected him to an unimaginable terror of being removed not only to an entirely foreign country, but one where he could be arbitrarily and indefinitely imprisoned without any recourse. At their core, Respondents' actions are unconstitutionally punitive and require immediate intervention from this Court.

II. ARGUMENT

A. Petitioner Does Not Seek a Mandatory Injunction to be Released from Custody.

Respondents incorrectly contend that Petitioner seeks a "mandatory injunction" to be released from custody. Petitioner seeks a prohibitory injunction to return him to the *status quo* prior to his unlawful re-detention—i.e. his supervised release. That is, he does not seek to be made any better than he was prior to Respondents' unlawful actions.

A prohibitory injunction prohibits a party from taking action and "preserve[s] the status quo pending a determination of the action on the merits." *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878 (9th Cir. 2009) (quoting *Chalk v. U.S. Dist. Court*, 840

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F.2d 701, 704 (9th Cir.1988)). A mandatory injunction "orders a responsible party to 'take action.'" *Id.* at 879 (quoting *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 484 (1996)).

The test for whether an injunction is mandatory or prohibitory focuses on the "*status quo ante litem*," which means "the last, uncontested status which preceded the parties' controversy." 42 Am. Jur. 2d *Injunctions* § 5 (2025) (citing *Washington v. U.S. Dep't of State*, 318 F. Supp. 3d 1247, 1251 (W.D. Wash. 2018)). "[T]he 'status quo' refers to the legally relevant relationship *between the parties* before the controversy arose." *Arizona Dream Act Coal. v. Brewer,* 757 F.3d 1053, 1061 (9th Cir. 2014).

Here, the status quo prior to Respondent's unlawful re-detention is his 21-year release under an order of supervision and he seeks an order restoring him to his release conditions. *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001) ("The choice. . . is not between imprisonment and the alien 'living at large.' . . . It is between imprisonment and supervision under release conditions that may not be violated."). This is plainly a prohibitory injunction. *See Hernandez v. Sessions*, 872 F.3d 976, 998 (9th Cir. 2017) (a prohibitory injunction "prevents future constitutional violations."); *see also* 42 Am. Jur. 2d *Injunctions* § 5 ("An injunction is considered prohibitory when the thing complained of results from present and continuing affirmative acts and the injunction merely orders the defendant to refrain from doing those acts."). Petitioner is unaware of any authority holding that an immigration detention litigant seeking release from re-detention to restore the prior conditions of their supervised release as a mandatory injunction, and Respondents cite none.

Accordingly, Petitioner need only meet the *Winter* standard for a prohibitory injunction, which in the Ninth Circuit requires only that Petitioner demonstrate "serious questions going to the merits and a balance of hardships that tips sharply towards [him]." *Fraihat v. U.S. Immigr. & Customs Enf't*, 16 F.4th 613, 635 (9th Cir. 2021) (internal quotation marks omitted). This standard is plainly met.

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B. Petitioner Has Established He is Likely to Succeed on the Merits of his Claims.

1. Respondents Fail to Legally Justify their Re-Detention of Petitioner.

Respondents fail on multiple counts to demonstrate that their re-detention of Petitioner is legally authorized.

First, despite asking this Court for more time, Respondents provide no additional evidence demonstrating the substantial likelihood of Petitioner's removal to Vietnam in the reasonably foreseeable future. *Compare* Dkt. 13 at 9 *with* Dkt. 22 at 17. Instead, Respondents expend considerable ink arguing that the burden to show significant likelihood of removal is Petitioner's. Dkt. 37 at 10-13. The government plainly mistakes the standard. The burden-shifting described in *Zadvydas* applies to a person seeking release for the first time from prolonged detention. *See Nguyen v. Hyde*, No. 25-cv11470-MJJ, 2025 WL 1725791, at *3 (D. Mass. June 20, 2025) ("This case is not about ICE's authority to detain in the first place upon an issuance of a final order of removal as in *Zadvydas*. This case is about ICE's authority to *re-detain* . . .").

Here, Petitioner was already released from custody under *Zadvydas*. To return Petitioner to custody following release, it is Respondents who must demonstrate "that there is a significant likelihood that the [individual] may be removed in the reasonably foreseeable future" to revoke Petitioner's release under the regulation and demands of due process. *See* 8 C.F.R. § 241.13(i)(2); *Nguyen*, 2025 WL 1725791, at *3, n.2 (admonishing the government's attempt at "improper burden shifting" when the regulation makes it the government's burden to determine changed circumstances); *Kong v. United States*, 62 F.4th 608, 619-20 (1st Cir. 2023) (ICE's regulation requires "(1) an individualized determination (2) by ICE that, (3) based on changed circumstances, (4) removal has become significantly likely in the reasonably foreseeable future."); *id.* 620 n.12 ("once a noncitizen has been granted supervised release, that release can only be revoked upon a showing that because of changed circumstances there is now a

'significant likelihood that the [noncitizen] will be removed in the reasonably foreseeable future.'") (quoting 8 C.F.R. § 241.13(i)(2)).[1]

Thus, as this Court already noted, the evidence Respondents have submitted "does little to establish the likelihood of Petitioner's removal." Dkt. 22 at 16. Presumably, if government statistics demonstrated that Vietnam now accepts most pre-1995 immigrants, Respondents would have produced them. (Indeed, the government produced these statistics in the class action *Trinh v. Homan*, 466 F.Supp.3d 1077 (C.D. Cal. 2020), showing that between 2017 and 2019, Vietnam issued travel documents to pre-1995 individuals only seven percent of the time, *id.* at1087-88.) If the facts of Petitioner's case suggested a high likelihood of acceptance by Vietnam under Vietnam's criteria for acceptance under the 2020 Memorandum of Understanding, Respondents would have said so. And if government statistics demonstrated that the general rate at which Vietnam processes travel document requests is now fast, Respondents too would have produced those statistics. They did not.

Instead, Respondents' evidence consists of the conclusory and hearsay statement of one ICE officer, Jamie Burns, claiming that another ICE unit "advised that there is currently a significant likelihood for removal in the reasonably foreseeable future. . . as to all Vietnamese citizens, regardless of date of entry; that the Government of Vietnam has been issuing travel documents to such aliens in less than 30 days; and that a charter flight for removals to Vietnam would be scheduled soon." Dkt. 14 ¶13. Burns claims that he has "observed the government of Vietnam issue travel documents to Vietnamese nationals who entered the United States before July 12, 1995," *id.* ¶14, but he does not say to whom, how many, or in what percentage of pre-95 case. Burns then perjures himself when he states that Petitioner's "case is currently under review

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[1] Respondents incredulously argue that neither *Kong* nor the regulation require them to make an "individualized determination" at the point of re-detention. Dkt. 37 at 14. This argument has no merit. Petitioner quotes the plain language of the *Kong* opinion requiring an "individualized determination" which the regulation requires at the point ICE removes supervised release and returns the individual to custody. 8 C.F.R. § 241.13(i)(2).

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by the Government of Vietnam for issuance of a travel document[]"—a fact Respondents admit was not true. *Compare id.* ¶16 *with* Dkt. 37 at 5. Indeed, nearly a month into Petitioner's detention, there is still no evidence that Vietnam is reviewing Petitioner's case. As of August 7, ICE had only "forwarded" the travel document request to the ICE Attaché for Vietnam. Dkt. 38 ¶3.

Respondents' second declaration, from Jessie Gonzalez, claims that in FY2024, ICE removed 58 final order Vietnamese citizens to Vietnam, but fails to say how many were pre-1995. Dkt. 18-1 ¶7. The veracity of this number is also questionable, as ICE claimed in a similar case that it had removed 44 individuals to Vietnam in FY2024. *Nguyen*, 2025 WL 1725791, at *3. The Gonzalez declaration also claims that in FY2025, ICE requested 301 travel documents, but it does not clarify how many were pre-1995, how many were granted, nor how long it took for Vietnam to process the requests. Dkt. 18-1 ¶8. Gonzalez states that ICE obtained travel documents in 225 cases but does not make clear whether those are 225 of the 301 requests made in FY2025 or if they pertain to travel document requests made in prior years. *Id.* Of the 225, it states that 154 entered before 1995. *Id.* At best, this declaration establishes an undisputed fact that Vietnam has begun issuing more travel documents for pre-1995 immigrants than before. It does not establish, however, any facts to substantiate Respondents' claim that it is "significantly likely" that Petitioner will be removed to Vietnam in the "reasonably foreseeable future."

The evidence demonstrates that at the time of Petitioner's re-detention, his removal was not significantly likely in the reasonably foreseeable future because no travel documents had been requested. Nearly a month into his detention, there is still no evidence ICE has submitted the request to Vietnam. *See* Dkt. 38 ¶3. Even if Respondents had submitted the travel document request before detaining him, Respondents provide no evidence that Vietnam is processing these requests quickly, other than the unsupported, hearsay, and conclusory statement from Burns, which also contains perjured testimony. Dkt. 14 ¶¶13-16. The unrebutted evidence is that Vietnam takes longer than 30 days to process pre-1995 requests for travel documents. *See* Dkt.

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28 ¶¶12-17; Dkt. 26 ¶13 (a year and a half after submitting a travel document request to Vietnam for a pre-1995 individual, Vietnam had yet to respond). Moreover, the unrebutted evidence shows that on June 9, according to government counsel in *Trinh*, ICE rescinded its longstanding policy of generally finding that pre-1995 Vietnamese individuals were not likely to be removed in the reasonably foreseeable future. Dkt. 26 ¶15. It shows that hundreds of pre-1995 Vietnamese immigrants have been detained since this policy change and remain detained longer than 30 days, Dkt. 28 ¶16, and that the government has since applied its third country removal practice to pre-1995 Vietnamese individuals, including in cases where the government did not even first attempt to repatriate them to Vietnam, *id.* ¶¶19-20 and Dkt. 29 ¶¶10-11.

This Court has already found that Petitioner's evidence "provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." Dkt. 22 at 15. Respondents have provided no additional evidence to disturb this finding. As in other recent cases, the Court is left with a record that fails to establish a significant likelihood of removal of pre-1995 individuals in general, *see Hoac v. Becerra*, No. 25-cv-01740DC-JDP 2025 WL 1993771, at *4 (E.D. Cal. July 16, 2025); *Phan v. Becerra*, No. 2:25-CV-01757, 2025 WL 1993735, at *4 (E.D. Cal. July 16, 2025); *Nguyen*, 2025 WL 1725791, at *4, and nothing indicating that it is likely in Petitioner's case. Rather, the unrebutted evidence shows a likelihood that removal may be difficult, given Petitioner's age, lack of documentation, and lack of family in Vietnam. Dkt. 28 ¶¶8, 10, 13-14; Dkt. 27 ¶¶19-20 (noting Petitioner's impression from his deportation officer that he lacked sufficient connection to Vietnam for Vietnam to grant a travel document).

Second, Respondents have no answer as to why their re-detention of Petitioner satisfies the requirements of procedural due process—indeed, they fail to respond at all. "[T]he government's discretion to incarcerate non-citizens is always constrained by the requirements of due process." *Hernandez*, 872 F.3d at 981. While the Supreme Court instructed in *Zadvydas* that a removable noncitizen may be released from custody on conditions of supervision and returned

to custody if those conditions are violated, 533 U.S. at 700, no conditions of supervision were violated here. Thus, as discussed in Petitioner's opening brief, Dkt. 25 at 18-20, when the government seeks to re-detain, it may only do so "upon review at a hearing before a neutral arbiter, regardless of whether government agents otherwise have statutory authority to re-detain." *Guillermo M.R. v. Kaiser*, No. 25-cv-05436-RFL, 2025 WL 1983677, at *5 (N.D. Cal. July 17, 2025) (citing *Morrissey v. Brewer*, 408 U.S. 471, 482, 489 (1972) and *Young v. Harper*, 520 U.S. 143, 148 (1997)). As numerous courts have held in a variety of immigration detention contexts, a procedural due process analysis does not permit the government to return an individual to custody following a decision to release them, absent pre-deprivation notice and a hearing. *See, e.g., id.* at *7 ("The fact that Petitioner is subject to discretionary conditions of release likewise does not mean he lacks a protectable liberty interest and can be re-detained without process."); *Azarte v. Andrews*, No. 1:25-cv-00942-KES-SKO, 2025 WL 2230521, at *6 (E.D. Cal. Aug. 4, 2025) (string citing cases); *Saravia v. Sessions*, 280 F. Supp. 3d 1168, 1195-97 (N.D. Cal. 2017), *aff'd sub nom. Saravia for A.H. v. Sessions*, 905 F.3d 1137 (9th Cir. 2018); *Garcia v. Andrews*, No. 2:25-cv-01884-TLN-SCR, 2025 WL 1927596, at *2-5 (E.D. Cal. July 14, 2025).

Here, the government has no legitimate interest in Petitioner's continued detention that is not unconstitutionally punitive, as Petitioner explained previously. Dkt. 25 at 13; *see Zadvydas*, 533 U.S. at 690 ("[G]overnment detention violates [the Due Process] Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections or, in certain special and narrow nonpunitive circumstances, where a special justification, such as harm-threatening mental illness, outweighs the individual's constitutionally protected interest in avoiding physical restraint.") (cleaned up). The government should be required to comply with Petitioner's order of supervision, which stated it would only detain Petitioner "[o]nce a travel document is obtained [by ICE]" and giving him "an opportunity for an orderly departure." Dkt. 26-7 at 5; *see also Ceesay v. Kurzdorfer*, No. 1:25-cv-267-LJV, 2025 WL 1284720, at *24 (W.D.N.Y. May 2, 2025) ("the government. . . cannot now renege on the promise [for an orderly departure]").

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Third, Respondents have not demonstrated compliance with the regulatory requirements. There is no question that "[u]pon revocation" of an individual's release, the regulations require (1) notice of the reasons for revocation, (2) an "initial informal interview promptly after his or her return to [ICE] custody to afford the [individual] an opportunity to respond to the reasons for revocation stated in the notification," (3) an opportunity for the individual 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 that he or she has not violated the order of supervision," and (4) a "revocation custody review" to include "an evaluation of any contested facts relevant to the revocation." 8 C.F.R. § 241.13(i)(3).

Here, Respondents offer no evidence that Petitioner was provided a notice of the reasons for revocation of his supervised release. Instead, it offers the perjured declaration of Burns who claims that "Petitioner was notified in writing that his OSUP was revoked and an informal interview was conducted." Dkt. 14 ¶15. Burns claims that *after* this notice and interview, Petitioner was transferred to the Northwest ICE Processing Center ("NWIPC"). *Id.* Petitioner, on the other hand, states that he was never provided a notice of the revocation of his release, Dkt. 27 ¶15, until he reached the NWIPC when a supervisor officer spoke to him about revoking his release, *id.* ¶14, and it was not until August 1 that he was provided a copy of the notice for the first time, Dkt. 26 ¶18. Whether or not the written revocation notice was promptly provided, the notice itself provides no regulatory-required reasons for the revocation, stating only "[y]our case is under current review by the Government of Vietnam"—a statement Respondents admit is false and fails to state the reasons for revocation. Therefore, Respondents did not and have not satisfied this first regulatory requirement.

Moreover, although a supervisory officer spoke to him at booking in the NWIPC to tell him his release was being revoked, Dkt. 27 ¶15, Respondents are incorrect to suggest that this was the initial interview required by the regulations. Dkt. 37 at 14. There is a clear difference between being told that your release is being revoked (which is what Petitioner says happened

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during his booking) and the regulatory requirements of an interview that affords Petitioner an opportunity to respond to the reasons given in the notice of revocation. 8 C.F.R. § 241.13(i)(3). This interview did not happen until August 1, more than two weeks after his detention, when Petitioner was actually provided a copy of the regulatorily-insufficient revocation notice and provided an opportunity to respond to it in writing. Dkt. 26 ¶18. Moreover, there is no evidence that the final step, the revocation custody review, has been conducted or provided to Petitioner.

Rather than respond to Petitioner's arguments, Respondents confusingly dispute the meaning of the regulatory framework and whether an individualized determination is required. Dkt. 37 at 13-16. The regulations at issue here, those related to revocation of supervised release set forth in 8 C.F.R. § 241.13(i)(2)-(3) are perfectly clear, as is Respondents' failure to comply with them.

Accordingly, Petitioner has demonstrated that he is likely to succeed on his claim that his re-detention by Respondents was unlawful.

2. Respondents Fail to Establish that Petitioner is Not Likely to Succeed on His Third Country Removal Claims.

Respondents have no substantive response to Plaintiff's claims that a preliminary injunction should issue to prevent his unlawful removal to a third country. Instead, Respondents argue that Petitioner's claims are not ripe because an ICE officer says it will provide Petitioner's counsel 24 hours notice before removing him to a third country, and because his claims are foreclosed by the litigation in *D.V.D. v. Department of Homeland Security*, No. 1:25-cv-10676, 2025 WL 1453640 (D. Mass. May 21, 2025); Dkt. 37 at 16-20. Both arguments fail.

As Respondent's admit, the July 9 memo is the current ICE policy on third country removals and applies to Petitioner. Dkt. 37 at 16 n.7; Dkt. 25 at 12. Respondents nonetheless argue that an ICE officer's unenforceable promise to give Petitioner 24-hour notice before a third country removal somehow magically moots Petitioner's claims. *See* Dkt. 25 at 12. In arguing mootness, Respondents have a "heavy burden of showing that the challenged conduct cannot

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reasonably be expected to start again." *Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014). ICE has not met that burden, as nothing would prevent ICE from applying its current third country removal policy to Petitioner, now or in the future—an action for which Petitioner would have no recourse. That is precisely why an injunction is needed.[2]

Respondents' argument that Petitioner's claims for relief are foreclosed by *D.V.D.* is also patently wrong. The *D.V.D.* plaintiffs do not seek relief from the government's policy and practice of punitive third country banishment. Rather, the *D.V.D.* plaintiffs seek relief against a policy that denies them the opportunity to make a fear-based claim against removal to a third country. *See D.V.D.*, No. 1:25-cv-10676, Dkt. 1 (Complaint). Therefore, the litigation in *D.V.D.* has no bearing on Petitioner's claim for relief against punitive removal to a third country.

Respondents' failure to substantively respond to Petitioner's punitive third country removal claim constitutes waiver. *See Sciacca v. Apple*, 362 F. Supp. 3d 787, 801-02 (N.D. Cal. 2019) (granting motion to dismiss because opposing party waived an issue by failing to respond to it). This Court can and should grant preliminary relief to Petitioner on this ground.

Furthermore, Respondents' arguments with respect to Petitioner's claim against non-punitive third country removal are also misplaced. Respondents' claims that the Supreme Court is likely to "reject[] and overturn[]" the preliminary injunction order of the district court is far-fetched and unsupported. Dkt. 37 at 18. Indeed, the Supreme Court provided no explanation for why it granted a stay of the preliminary injunction in *D.V.D.*, stating only that the injunction is stayed pending disposition of the appeal and any writ of certiorari. *Dep't of Homeland Sec. v. D.V.D.*, 145 S. Ct. 2153 (2025). The same is true of its clarification order. *See Dep't of Homeland Sec. v. D.V.D.*, 145 S.Ct. 2626 (2025). Respondents point to no authority for their

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[2] Even if ICE's commitment were enforceable, the law plainly requires more than 24 hours' notice to effectuate a third country removal, as discussed in Petitioner's opening brief, Dkt. 25 at 24-30.

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claim that these opinions somehow signal that ultimately the Government will prevail in *D.V.D.* Dkt. 37 at 18.

Moreover, while a district court "may properly dismiss an individual complaint 'because the complainant is a member in a class action seeking the *same relief*,'" *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir. 2013) (quoting *Crawford v. Bell*, 599 F.2d 890, 89 (9th Cir. 1979)), the Ninth Circuit has made clear that a class member in a pending class action may pursue individual claims for injunctive relief where the individual relief sought is "discrete from the claims for systemic reform" addressed in the class action. *Id.* at 1137. In *Pride*, the Ninth Circuit held that an class member's individual claim for prison medical care could proceed where declining to exercise jurisdiction over his claim due to his membership in a pending class action seeking systemic medical care reform "would lead to unwarranted delay" and render an individual "powerless to petition the courts for redress of [their individual] violation until [the class action], which has been pending now for twelve years, has been fully resolved." *Id.* The court concluded that the injunctive relief the individual sought was not duplicative of the class action, which sought systemic relief, because the plaintiff's claim "relates solely to his individual need for medical treatment." *Id.* at 1138.

The same rationale applies here. Petitioner seeks only individualized relief against any effort by ICE to remove him to a third country without satisfying the procedural requirements of the statute and due process. Dkt. 25 at 24-27. He does not challenge or seek systemic relief against ICE's third country removal policy. *See Pride*, 719 F.3d at 1137. And, as in *Pride*, he cannot obtain relief against third country removal in *D.V.D.* because the district court injunction is stayed. That is, absent relief here, he could be removed to a third country long before the resolution of the litigation in *D.V.D*, rendering him "powerless to petition the courts for redress." *See id.*

Moreover, the relief Petitioner seeks is not duplicative. Petitioner asks the Court to enjoin Respondents from failing to provide him a meaningful opportunity to seek *withholding of*

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removal prior to third country removal in reopened proceedings before an immigration judge under 8 U.S.C. § 1231(b)(3)(A). Dkt. 1 at 11, 15, 19. The plaintiffs in *D.V.D.* did not request this injunctive relief due to 8 U.S.C. § 1252(f)(1), which bars courts from "enjoin[ing] or restrain[ing] the operation of" specific provisions of the immigration statute, like 8 U.S.C. § 1231, "other than with respect to the application of such provisions to an individual [noncitizen] against whom proceedings under such part have been initiated." *See D.V.D.*, 1:25-cv-10676, Dkt. 7 at 20-21 (TRO and PI Motion) (explaining that Plaintiffs do not seek injunctive or declaratory relief on the withholding of removal claim, other than for individual named Plaintiffs, due to § 1252(f)(1)). Here, Petitioner explicitly seeks injunctive relief with respect to his right to apply for withholding of removal in reopened immigration court proceedings. Dkt. 25 at 25; Dkt. 1 at 11, 15, 19.

Finally, Petitioner does not seek to enjoin the same policy as the *D.V.D.* plaintiffs. Petitioner seeks to enjoin the application of Respondents' July 9 third country removal memo to his case, Dkt. 25 at 12, 24-27; Dkt. 1 at 20-21, whereas the *D.V.D.* plaintiffs challenge an unwritten policy and a directive issued on February 18, 2025, instructing DHS officers to review cases of individuals previously released from immigration detention for re-detention and removal to a third country. *D.V.D.*, 1:25-cv-10676, Dkt. 1 at 2-3, 19 (Complaint).

Accordingly, Petitioner's claims for injunctive relief against third country removal are not precluded from consideration by this Court.

III. CONCLUSION

For the foregoing reasons, this Court should immediately grant Petitioner's preliminary injunction.

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I certify that this memorandum contains 4,165 words, in compliance with the Local Civil Rules.

Respectfully submitted,

DATED: August 11, 2025.

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