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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

HAI THAI,

Petitioner,

v.

KRISTI NOEM, Secretary of the
Department of Homeland Security,
PAMELA JO BONDI, Attorney General,
TODD M. LYONS, Acting Director,
Immigration and Customs Enforcement,
JESUS ROCHA, Acting Field Office
Director, San Diego Field Office,
CHRISTOPHER LAROSE, Warden at
Otay Mesa Detention Center,

Respondents.

CIVIL CASE NO.: 25-cv-2436-RBM

**Traverse in
Support of
Petition for Writ of
Habeas Corpus**

INTRODUCTION

Having received the government's Return and supporting evidence, this Court should grant Mr. Thai's petition on all three claims. To do so, the Court need only follow recent decisions in this district and around the country.

First, this Court must grant the petition on Claim 1 because the government does not claim to have complied with 8 C.F.R. §§ 241.4, 241.13. For persons like Mr. Thai, those regulations permit re-detention only if ICE (1) "determines that there is a significant likelihood that the alien may be removed in the reasonably foreseeable future," *id.* § 241.13(i)(2), (2) makes that finding "on account of changed circumstances," *id.*, (3) provides "an initial informal interview promptly," *id.* §§ 241.4(l)(1), 241.13(i)(3), and (4) "affords the [person] an opportunity to respond to the reasons for revocation," *id.* The government provides no evidence that ICE took any of those steps in the course of re-detaining Mr. Thai. Just last week, on a record meaningfully indistinguishable from this one, Judge Huie granted a habeas petition for failure to follow § 241.13(i). *Rokhfirooz v. Larose*, 2025 WL 2646165 (S.D. Cal. Sept. 15, 2025).

Second, this Court must grant the petition on Count 2 because the government provides no evidence to satisfy the success element ("a significant likelihood of removal") or timing element ("in the reasonably foreseeable future") of *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). Though Deportation Officer ("DO") Cole asserts that "ICE has been routinely obtaining travel documents for Vietnamese citizens, including those who, like Petitioner, entered the United States before 1995," Doc. 7-1 at ¶ 12, he does not say (1) what percentage of the deportees entered pre-1995, (2) what proportion of Vietnamese citizens for whom travel documents are sought actually receive them, or (3) whether Mr. Thai qualifies for removal at all under the 2020 Memorandum of Understanding ("MOU"). (The government does not dispute that he may not be removed under the 2008 treaty.) Nor does DO Cole give any indication of how long it takes to get

1 travel documents for pre-1995 Vietnamese citizens—no statistics, no estimations,
2 no anecdotes, no nothing. The government instead relies on ICE’s plans to seek
3 travel documents. But as Judge Robinson ruled this week in granting a habeas
4 petition, a travel document request alone—with no evidence of likely success or
5 timing—does not satisfy the government’s burden under *Zadvydas*. *Rebenok v.*
6 *Noem*, 25-cv-2171-TWR.¹

7 Third, the government does not dispute that ICE’s third-country removal
8 policy violates due process. And the Ninth Circuit has squarely rejected the
9 government’s jurisdictional argument, holding that § 1252(g) does not prohibit
10 immigrants from asserting a “right to meaningful notice and an opportunity to
11 present a fear-based claim before [they] [are] removed,” or any other claim
12 asserting a “violation of [ICE’s] mandatory duties.” *Ibarra-Perez v. United States*,
13 __ F.4th __, 2025 WL 2461663, at *7, *9 (9th Cir. Aug. 27, 2025). And Judge
14 Moskowitz recently issued a TRO prohibiting third-country removal, even though
15 the government claimed there—as here—that ICE had no current plans to remove
16 the petitioner to a third country. *Tran v. Noem*, 25-cv-02391-BTM, Dkt. No. 6. The
17 contrary position would leave immigrants without protection from ICE’s policy,
18 which allows for a change of plans with minimal or no notice.

19 This Court should therefore grant the petition—or at least a temporary
20 restraining order (“TRO”)—on all three grounds.

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25 ¹ Judge Robinson ruled orally, but Mr. Thai has ordered the transcript and will
26 provide it upon receipt. In *Rebenok*, the government defended against the petition
27 on the ground that travel document requests were pending with Moldova and
28 Poland. Judge Robinson determined that, statutorily, the petitioner could not be
removed to any country other than Ukraine. But he also ruled that—despite the
pending travel document requests—the government had not proved that removal to
the third countries was significantly likely in the reasonably foreseeable future.

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2 **ARGUMENT**

3 **I. In light of the government’s response, Mr. Thai succeeds on the merits.**

4 With the government’s response in hand, this Court need not speculate about
5 whether Mr. Thai may succeed on the merits. Because the government’s evidence
6 is plainly insufficient to justify Mr. Thai’s detention, his petition should be granted
7 outright, or the Court should at least release him on a TRO pending further briefing.

8 **A. Count 1: As Judge Huie recently found when granting a habeas**
9 **petition in *Rokhfirooz*, ICE did not adhere to the regulations**
10 **governing re-detention.**

11 First, the government provides no evidence that ICE complied with 8 C.F.R.
12 §§ 241.4, 241.13. The government does not deny that these regulations apply to
13 Mr. Thai, that Mr. Thai may challenge them in this habeas case, or that failure to
14 comply with them is grounds for release. *See* Doc. 7 at 5–6. To the contrary, the
15 government agrees that Mr. Thai’s release was revoked under 8 C.F.R.
16 § 241.4(l)(2)(iii) and 8 C.F.R. § 241.13(i)(2). Doc. 7 at 6. But the government
17 implies that ICE complied with these regulations. *Id.* ICE did not.

18 Begin with 8 C.F.R. § 241.13(i)(2). That section provides that ICE may
19 “revoke an alien's release under this section and return the alien to custody if, on
20 account of changed circumstances, the Service determines that there is a significant
21 likelihood that the alien may be removed in the reasonably foreseeable future.” 8
22 C.F.R. § 241.13(i)(2) (emphasis added). That “regulation require[s] (1) an
23 individualized determination (2) by ICE that, (3) based on changed circumstances,
24 (4) removal has become significantly likely in the reasonably foreseeable future.”
25 *Kong v. United States*, 62 F.4th 608, 619–20 (1st Cir. 2023).

26 In *Rokhfirooz*, Judge Huie determined the fourth requirement was not met on
27 a record materially indistinguishable from this one. 2025 WL 2646165, at *3 (S.D.
28 Cal. Sept. 15, 2025). There, the government failed to produce “any documented
determination, made prior to Petitioner's arrest, that his release should be revoked.”

1 *Id.* at *3. The only documentation was “an arrest warrant, issued on DHS Form I-
2 200, merely recit[ing] that there is probable cause to believe that Petitioner is
3 ‘removable from the United States,’ that is, subject to removal, which would be
4 accurate whether or not Petitioner's release was revoked.” *Id.*

5 That is exactly the same documentation the government has produced here:
6 The government provides no documented, pre-arrest determination that release
7 should be revoked; it only references an arrest warrant stating that Mr. Thai is
8 removable. Doc. 7-2 at 3. The I-213 confirms that his arrest was premised entirely
9 on his status as a removable immigrant, not a determination that release should be
10 revoked due to changed circumstances making removal significantly likely. *Id.* at
11 4 (stating that he was “previously Ordered removed by a Immigration Judge, for
12 being a Alien Present Without Admission”).

13 Judge Huie also remarked in *Rokhfirooz* that the government had produced
14 “no record constitut[ing] a determination even after Petitioner's arrest that there is
15 a significant likelihood that Petitioner can be removed in the reasonably foreseeable
16 future.” 2025 WL 2646165, at *3. “In connection with defending [that] lawsuit,
17 Respondents prepared and filed a declaration from a Supervisory Detention and
18 Deportation Officer assigned to the detention center where Petitioner is housed,”
19 which stated that “[ICE Enforcement and Removal Operations] determined that
20 there is a significant likelihood of removal and resettlement in a third country in the
21 reasonably foreseeable future and re-detained Petitioner to execute his warrant of
22 removal.” *Id.* Judge Huie deemed that post-hoc determination insufficient, because
23 the declarant did not produce underlying documentation showing that any such
24 determination had actually been made—let alone that it had been made pre-arrest.
25 *Id.* The Court therefore “decline[d] to rely on” those statements. *Id.*

26 Here, the evidence is even weaker. The I-213 states that ICE previously tried
27 to remove Mr. Thai on at least three occasions but “[n]o travel document was
28 available for removal.” Doc. 7-2 at 3 (referencing attempts to remove him in

1 January 2010, November 2010, and April 2012). Other than blank assertions, DO
2 Cole does not explain or provide any evidence showing what has changed since
3 these three unsuccessful attempts that would somehow make a travel document
4 “available.” *See* Doc. 7-1 at 2–3. There is therefore “no evidence that DHS has
5 made such a determination as to the revocation of Petitioner's release even after the
6 fact of arrest, up to the present day.” *Rokhfirooz*, 2025 WL 2646165, at *4.

7 Additionally, even if ICE *had* revoked release because of a significant
8 likelihood of removal, that is not enough. The regulation requires that the likelihood
9 of removal arise out of “changed circumstances.” 8 C.F.R. § 241.13(i)(2). Here, the
10 same treaty and memorandum have applied to Mr. Thai’s removal for 16 and 5
11 years, respectively. Doc. 1 at 4–5. DO Cole identifies no changed circumstances,
12 nor does he assert that ICE premised re-detention on any such changes. And
13 “Respondents have not provided any details about why a travel document could not
14 be obtained in the past, nor have they attempted to show why obtaining a travel
15 document is more likely this time around.” *Hoac v. Becerra*, No. 2:25-CV-01740-
16 DC-JDP, 2025 WL 1993771, at *4 (E.D. Cal. July 16, 2025). Respondents have
17 announced only their “intent to eventually complete a travel document request for
18 Petitioner,” which “does not constitute a changed circumstance.” *Id.*

19 Finally, all of the above goes only to ICE’s violations of 8 C.F.R.
20 § 241.13(i)(2). Sections 241.4(l) and 241.13(i)(3) mandate additional procedures:
21 “[B]oth require ICE to provide ‘an initial informal interview promptly ... to afford
22 the alien an opportunity to respond to the reasons for revocation.’” *Rombot v. Souza*,
23 296 F. Supp. 3d 383, 387 (D. Mass. 2017) (quoting 8 C.F.R. §§ 241.4(l)(2),
24 241.13(i)(3)). Mr. Thai was not provided with this interview, *see* Doc. 1 at 15–16,
25 and DO Cole does not dispute that. That failure is yet another reason to grant this
26 petition. *See, e.g., Rombot*, 296 F. Supp. 3d at 386–89; *You v. Nielsen*, 321 F. Supp.
27 3d 451, 463–64 (S.D.N.Y. 2018); *Ceesay v. Kurzdorfer*, 781 F. Supp. 3d 137, 162–
28 66 (W.D.N.Y. 2025).

B. Claim 2: The government has not proved that there is a significant likelihood of removal in the reasonably foreseeable future.

Second, the government provides no evidence that Mr. Thai will likely be removed to Vietnam at all, let alone in the reasonably foreseeable future.

1. The government cites no authority for the proposition that Mr. Thai has not satisfied the 6-month *Zadvydas* grace period.

As an initial matter, the government appears to contest that Mr. Thai's aggregated six-plus months of detention count toward the six-month *Zadvydas* grace period—the government appears to contend that the six-month grace period starts over every time ICE re-detains someone. Doc. 7 at 7–8. “Courts . . . broadly agree” that this is not correct. *Diaz-Ortega v. Lund*, 2019 WL 6003485, at *7 n.6 (W.D. La. Oct. 15, 2019), *report and recommendation adopted*, 2019 WL 6037220 (W.D. La. Nov. 13, 2019); *see also Sied v. Nielsen*, No. 17-CV-06785-LB, 2018 WL 1876907, at *6 (N.D. Cal. Apr. 19, 2018) (collecting cases); *Nguyen v. Scott*, No. 2:25-CV-01398, 2025 WL 2419288, at *13 (W.D. Wash. Aug. 21, 2025).

None of the government's cited cases support that view, either. Doc. 7 at 7–9. Three involve petitioners who were *not* detained for a cumulative 6 months. *Ghamelian v. Baker*, No. CV SAG-25-02106, 2025 WL 2049981, at *1 (D. Md. July 22, 2025) (indicating in the statement of facts that petitioner was not detained until 2025); *Guerra-Castro v. Parra*, No. 1:25-CV-22487, 2025 WL 1984300, at *4 & n.5 (S.D. Fla. July 17, 2025) (“Even if the Court counted Petitioner's previous ICE detention, Petitioner's cumulative amount of detention would not total 6 months.”); *Grigorian v. Bondi*, No. 25-CV-22914-RAR, 2025 WL 1895479, at *8 (S.D. Fla. July 8, 2025) (“[Petitioner] was not in ICE post-removal-period detention until his detention on June 23, 2025.”). A fourth holds that detention *is* cumulative, supporting Mr. Thai. *Nhean v. Brott*, No. CV 17-28 (PAM/FLN), 2017 WL

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2437268, at *2 (D. Minn. May 2, 2017), *report and recommendation adopted*, No. CV 17-28 (PAM/FLN), 2017 WL 2437246 (D. Minn. June 5, 2017).²

A fifth cited case contends that the statutorily-defined 90-day removal period under 8 U.S.C. § 1231(a)(1)(B) starts over on re-detention. *Farah v. INS*, No. Civ. 02-4725(DSD/RLE), 2003 WL 221809, at *5 (D. Minn. Jan. 29, 2013). But even a cursory review of § 1231(a)(1)(B) shows that that is not true. The statute defines three, specific starting dates for the removal period, none of which involve re-detention. *See Bailey v. Lynch*, No. CV 16-2600 (JLL), 2016 WL 5791407, at *2 (D.N.J. Oct. 3, 2016) (explaining this). The six-month grace period has therefore ended, and so—contrary to the government’s claims—Mr. Thai need not “rebut[] the presumptively reasonable period of detention.” Doc. 7 at 6.

2. The government provides no evidence to support a “significant likelihood of removal” to Vietnam.

Because the six-month grace period has passed, this court moves on to the burden-shifting framework. The government does not deny that Mr. Thai has provided “good reason” to doubt his reasonably foreseeable removal, thereby forfeiting the issue. *See Moallin v. Cangemi*, 427 F. Supp. 2d 908, 928 (D. Minn. 2006). The burden therefore shifts to the government to prove that there is a “significant likelihood of removal in the reasonably foreseeable future.” *Zadvydas*, 533 U.S. at 701. That standard has a success element (“significant likelihood of removal”) and a timing element (“in the reasonably foreseeable future”). The government meets neither.

As an initial matter, the government has not shown that Mr. Thai’s removal to Vietnam is “significant[ly] like[ly].” *Zadvydas*, 533 U.S. at 701.

² All of these courts were wrong to tie the *Zadvydas* period to the length of detention, rather than the time since the removal order become final. *See, e.g., Zavvar v. Scott*, No. CV 25-2104-TDC, 2025 WL 2592543, at *4 (D. Md. Sept. 8, 2025) (collecting cases). But that does not matter in this case, because Mr. Thai was detained for more than 6 cumulative months.

1 First, DO Cole’s assertion that “ICE has been routinely obtaining travel
2 documents for Vietnamese citizens,” Doc. 7-1 at ¶ 12, does not show that Mr.
3 Thai’s removal is significantly likely, for several reasons. “More glaring[ly],” DO
4 Cole “does not identify how many of the . . . individuals” routinely removed “were
5 *pre-1995 Vietnamese refugees*, like Mr. [Thai].” *Nguyen v. Hyde*, No. 25-CV-
6 11470-MJJ, 2025 WL 1725791, at *4 (D. Mass. June 20, 2025); *accord Nguyen*,
7 2025 WL 2419288, at *17 (finding statistics insufficient when declarant “did not
8 note how many were pre-1995 arrivals”). As the petition showed without
9 contradiction, pre-1995 arrivals face unique removal challenges: They are
10 exempted from the 2008 treaty entirely, and only some are eligible for removal
11 under the 2020 Memorandum of Understanding (“MOU”). Doc. 1 at 3–5. And
12 statistics provided in the petition show that the vast majority of ICE’s travel
13 document requests for pre-1995 Vietnamese immigrants have historically been
14 denied, even under the MOU. *Id.* at 4–5. Without knowing how many of DO Cole’s
15 cited cases involve pre-1995 immigrants, his statement carries little weight.

16 Furthermore, DO Cole’s statement does not even suggest that a high
17 *proportion* of Vietnamese citizens are successfully removed when ICE seeks travel
18 documents. “[I]f the total number of requests that were made to Vietnam was
19 disclosed, [this Court] might be able to gauge how likely it is that Petitioner would
20 be removed to Vietnam. If DHS submitted 350 requests and Vietnam issued travel
21 documents for 328 individuals, Respondents may very well have shown that
22 removal is significantly likely in the reasonably foreseeable future. On the other
23 hand, if DHS submitted 3,500 requests and only 328 individuals received travel
24 documents, Respondents would not be able to meet their burden.” *Nguyen*, 2025
25 WL 1725791, at *4; *accord Hoac*, 2025 WL 1993771, at *5. DO Cole provides no
26 ratio of requests to travels documents issued, precluding this kind of analysis.

27 Just as importantly, courts have “demanded an individualized analysis” of
28 why *this* person—Mr. Thai—will likely be removed. *Nguyen*, 2025 WL 2419288,

1 at *17 (citing *Nguyen*, 2025 WL 1725791, at *4). This Court cannot know if Mr.
2 Thai qualifies at all under the MOU, because (1) the MOU applies only to persons
3 meeting certain criteria, but (2) the government has never disclosed in full what
4 those criteria are. *Id.* at *6. And even for those who qualify, the MOU provides only
5 that Vietnam has “discretion whether to issue a travel document,” which it exercises
6 “on a case-by-case basis.” *Hoac*, 2025 WL 1993771, at *5. By itself, then, “the
7 MOU has repeatedly been deemed insufficient to show a significant likelihood of
8 remova[l] in the reasonably foreseeable future.” *Nguyen*, 2025 WL 2419288, at
9 *17. Because “[t]he government has not provided any evidence of Vietnam’s
10 eligibility criteria or why it believes Petitioner now meets it,” the government’s
11 evidence is insufficient. *Id.* at *18.

12 *Second*, even if ICE had requested travel documents for Mr. Thai—and, to
13 date, it has not, Doc. 7-1 at ¶ 10—good faith efforts to secure a travel document do
14 not themselves satisfy *Zadvydas*. In fact, the petitioner in *Zadvydas* appealed a
15 “Fifth Circuit h[olding] [that] [the petitioner’s] continued detention [was] lawful as
16 long as good faith efforts to effectuate deportation continue and [the petitioner]
17 failed to show that deportation will prove impossible.” 533 U.S. at 702 (cleaned
18 up). The Supreme Court reversed, finding that the Fifth Circuit’s good-faith-efforts
19 standard “demand[ed] more than our reading of the statute can bear.” *Id.*

20 Thus, “under *Zadvydas*, the reasonableness of Petitioner’s detention does not
21 turn on the degree of the government’s good faith efforts. Indeed, the *Zadvydas*
22 court explicitly rejected such a standard. Rather, the reasonableness of Petitioner’s
23 detention turns on whether and to what extent the government’s efforts are likely to
24 bear fruit.” *Hassoun v. Sessions*, No. 18-CV-586-FPG, 2019 WL 78984, at *5
25 (W.D.N.Y. Jan. 2, 2019). Accordingly, “the Government is required to demonstrate
26 the likelihood of not only the *existence* of untapped possibilities, but also of a
27 probability of success in such possibilities.” *Elashi v. Sabol*, 714 F. Supp. 2d 502,
28 506 (M.D. Pa. 2010).

Here, then, “[w]hile the respondent asserts that [Mr. Thai’s] travel document requests with [the Vietnamese] Consulate[]” will be lodged, “this is insufficient. It is merely an assertion of good-faith efforts to secure removal; it does not make removal likely in the reasonably foreseeable future.” *Gilali v. Warden of McHenry Cnty.*, No. 19-CV-837, 2019 WL 5191251, at *5 (E.D. Wis. Oct. 15, 2019). Many courts have agreed that requesting travel documents does not itself make removal reasonably likely. *See, e.g., Andreason v. Gonzales*, 446 F. Supp. 2d 1186, 1189 (W.D. Wash. 2006) (holding evidence that the petitioner’s case was “still under review and pending a decision” did not meet respondents’ burden); *Islam v. Kane*, No. CV-11-515-PHX-PGR, 2011 WL 4374226, at *3 (D. Ariz. Aug. 30, 2011), *report and recommendation adopted*, 2011 WL 4374205 (D. Ariz. Sept. 20, 2011) (“Repeated statements from the Bangladesh Consulate that the travel document request is pending does not provide any insight as to when, or if, that request will be fulfilled.”); *Khader v. Holder*, 843 F. Supp. 2d 1202, 1208 (N.D. Ala. 2011) (granting petition despite pending travel document request, where “[t]he government offers nothing to suggest when an answer might be forthcoming or why there is reason to believe that he will not be denied travel documents”); *Mohamed v. Ashcroft*, No. C01-1747P, 2002 WL 32620339, at *1 (W.D. Wash. Apr. 15, 2002) (granting petition despite pending travel document request). That includes Judge Robinson’s recent ruling. *See supra*, Introduction (explaining the *Rebenok* ruling).

3. The government provides no evidence to support that any such removal will occur “in the reasonably foreseeable future.”

Additionally, even if ICE will eventually remove Mr. Thai, the government provides zero evidence that removal will happen “in the reasonably foreseeable future.” *Zadvydas*, 533 U.S. at 701. DO Cole provides no timetable for how long travel document requests like his typically take—no statistics, no estimations, no anecdotes, no nothing.

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1 That is fatal. “[D]etention may not be justified on the basis that removal to a
2 particular country is likely *at some point* in the future; *Zadvydas* permits continued
3 detention only insofar as removal is likely in the *reasonably foreseeable* future.”
4 *Hassoun*, 2019 WL 78984, at *6. “The government’s active efforts to obtain travel
5 documents from the Embassy are not enough to demonstrate a likelihood of
6 removal in the reasonably foreseeable future where the record before the Court
7 contains no information to suggest a timeline on which such documents will
8 actually be issued.” *Rual v. Barr*, No. 6:20-CV-06215 EAW, 2020 WL 3972319,
9 at *4 (W.D.N.Y. July 14, 2020). “[I]f DHS has no idea of when it might reasonably
10 expect [Mr. Thai] to be repatriated, this Court certainly cannot conclude that his
11 removal is likely to occur—or even that it *might* occur—in the reasonably
12 foreseeable future.” *Singh v. Whitaker*, 362 F. Supp. 3d 93, 102 (W.D.N.Y. 2019).

13 Courts have routinely granted habeas petitions where, as here, the
14 government does not establish *Zadvydas*’s timing element. *See, e.g., Balza v. Barr*,
15 No. 6:20-CV-00866, 2020 WL 6143643, at *5 (W.D. La. Sept. 17, 2020), *report*
16 *and recommendation adopted*, No. 6:20-CV-00866, 2020 WL 6064881 (W.D. La.
17 Oct. 14, 2020) (“[A] theoretical possibility of eventually being removed does not
18 satisfy the government’s burden[.]”); *Eugene v. Holder*, No. 408CV346-RH WCS,
19 2009 WL 931155, at *4 (N.D. Fla. Apr. 2, 2009) (“While Respondents contend
20 Petitioner *could* be removed to Haiti, it has not been shown that it is significantly
21 likely that Petitioner *will* be removed in the *reasonably foreseeable* future.”);
22 *Abdel-Muhti v. Ashcroft*, 314 F. Supp. 2d 418, 426 (M.D. Pa. 2004) (granting
23 petition because even if “Petitioner’s removal will ultimately be effected . . . the
24 Government has not rebutted the presumption that removal is not likely to occur in
25 the reasonably foreseeable future”); *Seretse-Khama v. Ashcroft*, 215 F. Supp. 2d
26 37, 50 (D.D.C. 2002) (granting petition where the government had not provided
27 any “evidence . . . that travel documents will be issued in a matter of days or weeks
28 or even months”).

1 In sum, then, there could be “some possibility that Vietnam will accept
2 Petitioner at some point. But that is not the same as a significant likelihood that he
3 will be accepted in the reasonably foreseeable future.” *Nguyen*, 2025 WL 2419288,
4 at *16. Mr. Thai therefore succeeds under *Zadvydas*, too.

5 **C. Claim 3: The government does not deny that ICE’s third-country**
6 **removal policy violates due process, and this claim is justiciable.**

7 This Court should also prohibit ICE from removing Mr. Thai to a third
8 country without adequate notice. The government does not try to defend ICE’s
9 third-country removal policy on the merits. Instead, the government says that a
10 third-country removal challenge is nonjusticiable under Article III because ICE
11 professes no current plans to remove Mr. Thai to a third country. Doc. 7 at 2–3.

12 But “[t]here, so to speak, lies the rub.” *D.V.D. v. U.S. Dep’t of Homeland*
13 *Sec.*, 778 F. Supp. 3d 355, 389 n.44 (D. Mass. 2025). “[A]ccording to
14 [Respondents], an individual must await notice of removal before his claim is
15 ripe[.]” *Id.* But under ICE’s policy, “there is no notice” for certain removals and
16 inadequate notice for others. *Id.* And if Mr. Thai “is removed” before he can raise
17 this challenge, Respondents will then argue that “there is no jurisdiction” to bring
18 him back to the United States. *Id.*

19 This Court need not adopt that Kafkaesque view. The government has not
20 denied that “the default procedural structure without an injunction” is “set forth in
21 DHS’s March 30 and July 9, 2025 policy memoranda,” which provide for third-
22 country removal with little or no notice. *Y.T.D. v. Andrews*, No. 1:25-CV-01100
23 JLT SKO, 2025 WL 2675760, at *5 (E.D. Cal. Sept. 18, 2025). And Mr. Thai has
24 “point[ed] to numerous examples of cases involving individuals who DHS has
25 attempted to remove to third countries with little or no notice or opportunity to be
26 heard.” *Id.*; see Doc. 1 at 18. “On balance,” then, “there is a sufficiently imminent
27 risk that [Mr. Thai] will be subjected to improper process in relation to any third
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1 country removal to warrant imposition of an injunction requiring additional
2 process.” *Y.T.D.*, 2025 WL 2675760, at *11.

3 **D. Section 1252(g) does not deprive this Court of jurisdiction.**

4 Finally, this Court has jurisdiction. Contrary to the government’s arguments,
5 § 1252(g) does not bar review of “all claims arising from deportation proceedings.”
6 *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999). Instead,
7 courts “have jurisdiction to decide a purely legal question that does not challenge
8 the Attorney General's discretionary authority.” *Ibarra-Perez v. United States*, __
9 F.4th __, 2025 WL 2461663, at *6 (9th Cir. Aug. 27, 2025) (cleaned up).

10 In *Ibarra-Perez*, the Ninth Circuit squarely held that § 1252(g) does not
11 prohibit immigrants from asserting a “right to meaningful notice and an opportunity
12 to present a fear-based claim before [they] [are] removed,” *id.* at *7³—the same
13 claim that Mr. Thai raises here with respect to third-country removals. The Court
14 reasoned that “§ 1252(g) does not prohibit challenges to unlawful practices merely
15 because they are in some fashion connected to removal orders.” *Id.* Instead,
16 § 1252(g) is “limited . . . to actions challenging the Attorney General's
17 discretionary decisions to initiate proceedings, adjudicate cases, and execute
18 removal orders.” *Arce v. United States*, 899 F.3d 796, 800 (9th Cir. 2018). It does
19 not apply to arguments that the government “entirely lacked the authority, and
20 therefore the discretion,” to carry out a particular action. *Id.* at 800. Thus, § 1252(g)
21 applies to “discretionary decisions that [the Secretary] actually has the power to
22 make, as compared to the violation of his mandatory duties.” *Ibarra-Perez*, 2025
23 WL 2461663, at *9.

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26 ³ Mr. Ibarra-Perez raised this claim in a post-removal Federal Tort Claims Act
27 (“FTCA”) case, *id.* at *2, while this is a pre-removal habeas petition. But the
28 analysis under § 1252(g) remains the same, because both Mr. Ibarra-Perez and
Mr. Thai are challenging the same kind of agency action. *See Kong*, 62 F.4th at
616–17 (explaining that a decision about § 1252(g) in an FTCA case would also
affect habeas jurisdiction).

1 The same logic applies to all of Mr. Thai's claims, because he challenges
2 only violations of ICE's mandatory duties under statutes, regulations, and the
3 Constitution. Accordingly, "[t]hough 8 U.S.C § 1252(g), precludes this Court from
4 exercising jurisdiction over the executive's decision to 'commence proceedings,
5 adjudicate cases, or execute removal orders against any alien,' this Court has habeas
6 jurisdiction over the issues raised here, namely the lawfulness of [Mr. Thai's]
7 continued detention and the process required in relation to third country removal."
8 *Y.T.D.*, 2025 WL 2675760, at *5. Many courts agree. *See, e.g., Kong*, 62 F.4th at
9 617 ("§ 1252(g) does not bar judicial review of Kong's challenge to the lawfulness
10 of his detention," including ICE's "fail[ure] to abide by its own regulations");
11 *Cardoso v. Reno*, 216 F.3d 512, 516 (5th Cir. 2000) ("[S]ection 1252(g) does not
12 bar courts from reviewing an alien detention order[.]"); *Parra v. Perryman*, 172
13 F.3d 954, 957 (7th Cir. 1999) (1252(g) did not apply to a "claim concern[ing]
14 detention"); *J.R. v. Bostock*, No. 2:25-CV-01161-JNW, 2025 WL 1810210, at *3
15 (W.D. Wash. June 30, 2025) (1252(g) did not apply to claims that ICE was "failing
16 to carry out non-discretionary statutory duties and provide due process"); *D.V.D. v.*
17 *U.S. Dep't of Homeland Sec.*, 778 F. Supp. 3d 355, 377–78 (D. Mass. 2025)
18 (§ 1252(g) did not bar review of "the purely legal question of whether the
19 Constitution and relevant statutes require notice and an opportunity to be heard
20 prior to removal of an alien to a third country").

21 **II. The remaining TRO factors decidedly favor Mr. Thai.**

22 This Court need not evaluate the other TRO factors—the Court may simply
23 grant the petition outright. But if the Court does decide to evaluate irreparable harm
24 and balance of harms/public interest, Mr. Thai should prevail.

25 On the irreparable harm prong, "[i]t is well established that the deprivation
26 of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres*
27 *v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). And contrary to the government's
28

arguments,⁴ the Ninth Circuit has specifically recognized the “irreparable harms imposed on anyone subject to immigration detention.” *Hernandez v. Sessions*, 872 F.3d 976, 995 (9th Cir. 2017). Furthermore, “[i]t is beyond dispute that Petitioner would face irreparable harm from removal to a third country.” *Nguyen*, 2025 WL 2419288, at *26.

On the balance-of-equities/public-interest prong, the government is correct that there is a “public interest in prompt execution of removal orders.” *Nken v. Holder*, 556 U.S. 418, 436 (2009). But that interest is diminished here because the government likely cannot remove Mr. Thai in the reasonably foreseeable future, and even if it could, it is equally “well-established that ‘our system does not permit agencies to act unlawfully even in pursuit of desirable ends.’” *Nguyen*, 2025 WL 2419288, at *28 (quoting *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 594 U.S. 758, 766 (2021)). It also “would not be equitable or in the public’s interest to allow the [government] to violate the requirements of federal law” with respect to detention and re-detention, *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014) (cleaned up), or to imperil the “public interest in preventing aliens from being wrongfully removed,” *Nken*, 556 U.S. 418, 436.

Conclusion

For all these reasons, this Court should grant the petition, or at least enter a temporary restraining order and injunction. In either case, the Court should (1) order Mr. Thai’s immediate release, and (2) prohibit the government from removing Mr. Thai to a third country without following the process laid out in

⁴ The government cites several cases to support the position that illegal immigration detention is not irreparable harm. Doc. 7 at 9–10. But both cases involved immigrants who (1) had already received a bond hearing and (2) were actively appealing to the BIA, but (3) wanted a federal court to intervene before the appeal was done. *Reyes v. Wolf*, No. C20-0377JLR, 2021 WL 662659, at *1 (W.D. Wash. Feb. 19, 2021), and *Lopez Reyes v. Bonnar*, No. 18-CV-07429-SK, 2018 WL 7474861, at *1–5 (N.D. Cal. Dec. 24, 2018). These courts indicated only that post-bond-hearing detention pending an ordinary BIA appeal was not irreparable harm. *Reyes*, 2021 WL 662659, at *3; *Lopez Reyes*, 2018 WL 7474861, at *10.

1 *D.V.D. v. U.S. Dep't of Homeland Sec.*, No. CV 25-10676-BEM, 2025 WL
2 1453640, at *1 (D. Mass. May 21, 2025).
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4 Respectfully submitted,

5 Dated: September 30, 2025

s/ Kara Hartzler

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