Hien Vu
A# [redacted]
Otay Mesa Detention Center
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Pro Se[1]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HIEN VU,

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.: '25CV2586 BJC KSC

Petition for Writ of Habeas Corpus

[28 U.S.C. § 2241]

[1] Mr. Vu is filing this petition for a writ of habeas corpus with the assistance of the Federal Defenders of San Diego, Inc., who drafted the instant petition. That same counsel also assisted the petitioner in preparing and submitting his request for the appointment of counsel, which has been filed concurrently with this petition, and all other documents supporting the petition. Federal Defenders has consistently used this procedure in seeking appointment for immigration habeas cases. The Declaration of Katie Hurrelbrink in Support of Appointment Motion attaches case examples.

INTRODUCTION

Mr. Vu and his family fled Vietnam in 1984. In 1997, he sustained a robbery conviction, leading to a final order of removal in September 2000. But when it came to his removal, there was a problem: Vietnam has a longstanding policy of not accepting pre-1995 Vietnamese immigrants for deportation. Nevertheless, the former Immigration and Naturalization Service ("INS") detained Mr. Vu for 10 months. While he was detained, the Supreme Court decided *Zadvydas v. Davis*, 533 U.S. 678 (2001). Judge Whalen then ordered INS to release Mr. Vu and 27 other detainees in one of this district's first *Zadvydas* rulings.

Mr. Vu remained on supervision for the next 24 years. During that time, he became a devoted single father to five children, including two children with severe autism. He also checked in with ICE as scheduled for almost two decades.

Nevertheless, ICE re-detained him on August 14, 2025. Contrary to regulation, ICE did not identify any changed circumstances that made his removal more likely or give Mr. Vu an opportunity to contest re-detention. He has now been detained for over a month, with no travel document in sight. Worse yet, on July 9, 2025, ICE adopted a new policy permitting removals to third countries with no notice, six hours' notice, or 24 hours' notice depending on the circumstances, providing no meaningful opportunity to make a fear-based claim against removal.

Mr. Vu's detention violates *Zadvydas v. Davis*, 533 U.S. 678 (2001), Mr. Vu's statutory and regulatory rights, and the Fifth Amendment. Mr. Vu must be released under *Zadvydas* because—having proved unable to remove him for the last 25 years—the government cannot show that there is a "significant likelihood of removal in the reasonably foreseeable future." *Id.* at 701. ICE's failure to follow its own regulations provides a second, independent ground for release. Finally, ICE may not remove Mr. Vu to a third country without providing

an opportunity to assert fear of persecution or torture before an immigration judge. This Court should grant this habeas petition on all three grounds.

STATEMENT OF FACTS

I. After winning one of this district's first *Zadvydas* habeas petitions, Mr. Vu lived peacefully in the community and cared for his five children—including two kids with autism—for 24 years.

In 1984, Hien Vu fled Vietnam with his mom and dad. Exh. A at ¶ 2. His San Jose-based aunt sponsored the family. *Id.* They soon obtained green cards. *Id.* In 1997, however, Mr. Vu was arrested for second degree robbery. *Id.* at ¶ 3. The conviction led to a May 1, 2000 order of removal. *Id.* Mr. Vu then appealed to the BIA, which finished processing the appeal on September 29, 2000.[2] ICE detained Mr. Vu for over 10 months after that. *Id.* at ¶ 4; Exh. C.

While Mr. Vu was detained, the Supreme Court handed down the opinion in *Zadvydas v. Davis*, 533 U.S. 678 (2001). Shortly after, on August 6, 2001, Judge Whalen released Mr. Vu and 27 other detainees under *Zadvydas*. Exh. C.

Mr. Vu remained on an order of supervision for the next 24 years. Exh. A at ¶¶ 4, 7. During that time, Mr. Vu lived a law-abiding life dedicated to his family. Mr. Vu has five kids, two of whom have autism. Exh. A at ¶ 12. Mr. Vu is a single father—the kids' mother is not in the picture—and Mr. Vu's parents are deceased, so they cannot help either. *Id.*

Mr. Vu has only one conviction since his release. In 2018,[3] Mr. Vu was taking one of his kids to an Individualized Education Plan (IEP) meeting at school. *Id.* at ¶ 7. He had to bring his daughter along. *Id.* She said that she was tired, and Mr. Vu let her take a nap in the car. *Id.* When school employees found her there, they feared that she would overheat and called the police. *Id.* Mr. Vu's

[2] EOIR, *Automated Case Information*, https://acis.eoir.justice.gov/en/.

[3] Mr. Vu remembered that the conviction was from 2013, but the state court docket reflects that the conviction was from 2018.

daughter was taken to the hospital as a precaution, but she was unharmed and was released the same day. *Id.* Mr. Vu spent one day in county jail. *Id.*

Otherwise, Mr. Vu has had no other convictions. And he has consistently checked in with ICE. He has not missed a check-in since 2006. *Id.* at ¶ 5.

On August 14, 2025, Mr. Vu appeared at one of these check-ins as scheduled. *Id.* at ¶ 7. He was re-detained, leaving his girlfriend to care for his five kids by herself. *Id.* at ¶ 11.

Since then, Mr. Vu has not had any formal meetings with a deportation officer. *Id.* at ¶ 8. (He once informally asked a DO about his case when she visited his pod, but she did not really know anything. *Id.*) Nor has ICE given Mr. Vu any formal paperwork explaining why he was re-detained or identifying changed circumstances that make his removal more likely. *Id.* at ¶ 9. He has never gotten an opportunity to tell ICE why he should not be re-detained. *Id.*

II. Vietnam has a longstanding policy of not accepting Vietnamese immigrants who entered before 1995.

There is an obvious reason why ICE has proved unable to remove Mr. Vu for the last 25 years: Vietnam has a longstanding policy of not accepting pre-1995 Vietnamese immigrants for deportation. In 2008, Vietnam and the United States signed a repatriation treaty under which Vietnam agreed to consider accepting certain Vietnamese immigrants for deportation. *See Trinh v. Homan*, 466 F. Supp. 3d 1077, 1083 (C.D. Cal. 2020). The treaty exempted pre-1995 Vietnamese immigrants, providing, "Vietnamese citizens are not subject to return to Vietnam under this Agreement if they arrived in the United States before July 12, 1995."

Agreement Between the United States of America and Vietnam, at 2 (Jan. 22, 2008).[4]

Despite that limit, the first Trump administration detained Vietnamese immigrants and held them for months, while the administration tried to pressure Vietnam to take them. *See Trinh*, 466 F. Supp. 3d at 1083–84. That possibility did not materialize. "In total, between 2017 and 2019, ICE requested travel documents for pre-1995 Vietnamese immigrants 251 times. Vietnam granted those requests only 18 times, in just over seven percent of cases." *Id.* at 1084. The administration was forced to release many of these detainees in 2018. *See id.*

Eventually, in 2020, the administration secured a Memorandum of Understanding ("MOU") with Vietnam, which created a process through which the Vietnamese government could consider some pre-1995 Vietnamese immigrants for removal.[5] The MOU limited consideration to persons meeting certain criteria, but many these criteria have been shielded from public view. *See Nguyen v. Scott*, No. 2:25-CV-01398, 2025 WL 2419288, at *14 (W.D. Wash. Aug. 21, 2025). When an immigrant does qualify, the MOU provides only that Vietnam has "discretion whether to issue a travel document," which it exercises "on a case-by-case basis." *Hoac v. Becerra*, No. 2:25-CV-01740-DC-JDP, 2025 WL 1993771, at *5 (E.D. Cal. July 16, 2025).

Even after signing the MOU, Vietnam overwhelmingly declined to timely issue travel documents for pre-1995 immigrants. By October 2021, ICE had adopted a "policy of generally finding that 'pre-1995 Vietnamese immigrants' . . . are not likely to be removed in the reasonably foreseeable future." Order on Joint Motion for Entry of Stipulated Dismissal, *Trihn*, 18-CV-

[4] available at https://www.state.gov/wp-content/uploads/2019/02/08-322-Vietnam-Repatriations.pdf

[5] https://cdn.craft.cloud/5cd1c590-65ba-4ad2-a52c-b55e67f8f04b/assets/media/ALC-FOIA-Re-Release-MOU-bates-1-8-8-10-21.pdf.

316-CJC-GJS, Dkt. 161 at 3 (C.D. Cal. Oct. 7, 2021).[6] That admission aligned with two years' worth of quarterly reports that ICE agreed to submit as part of a class action settlement. Those quarterly reports showed that between September 2021 and September 2023, only four immigrants who came to the U.S. before 1995 were given travel documents and deported. Asian Law Caucus, *Resources on Deportation of Vietnamese Immigrants Who Entered the U.S. Before 1995* (Jul. 15, 2025) (providing links to all quarterly reports).[7] During the same period, ICE made 14 requests for travel documents that, as of 2023, had not been granted, including requests made months or years before the September 2023 cutoff. *See id.* (proposed counsel's count based on quarterly reports).

On June 9, 2025, the Trump administration rescinded ICE's policy of generally finding that pre-1995 Vietnamese immigrants were not likely to be removed in the reasonably foreseeable future. *See Nguyen v. Scott*, No. 2:25-CV-01398, 2025 WL 2419288, at *7 (W.D. Wash. Aug. 21, 2025). But since then, several courts have found that facts on the ground likely have not changed enough to show that these detainees will be timely removed to Vietnam. *See Nguyen v. Scott*, No. 2:25-CV-01398, 2025 WL 2419288, at *17 (W.D. Wash. Aug. 21, 2025); *Hoac*, 2025 WL 1993771, at *4; *Nguyen v. Hyde*, No. 25-CV-11470-MJJ, 2025 WL 1725791, at *5 (D. Mass. June 20, 2025).

III. The government is carrying out deportations to third countries without providing sufficient notice and opportunity to be heard.

When immigrants cannot be removed to their home country—including Vietnamese immigrants—ICE has begun deporting those individuals to third countries without adequate notice or a hearing. The Trump administration

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[6] https://static1.squarespace.com/static/5f0cc12a064e9716d52e6052/t/618e99e5613d7372c1bb197e/1636735461479/Trinh+-+Doc+161+Order+Granting+Stip+Dismissal.pdf.

[7] https://www.asianlawcaucus.org/news-resources/guides-reports/trinh-reports

reportedly has negotiated with at least 58 countries to accept deportees from other nations. Edward Wong et al, *Inside the Global Deal-Making Behind Trump's Mass Deportations*, N.Y. Times, June 25, 2025. On June 25, 2025, the New York Times reported that seven countries—Costa Rica, El Salvador, Guatemala, Kosovo, Mexico, Panama, and Rwanda—had agreed to accept deportees who are not their own citizens. *Id.* Since then, ICE has carried out highly publicized third country deportations to South Sudan and Eswatini.

The Administration has reportedly negotiated with countries to have many of these deportees imprisoned in prisons, camps, or other facilities. The government paid El Salvador about $5 million to imprison more than 200 deported Venezuelans in a maximum-security prison notorious for gross human rights abuses, known as CECOT. *See id.* In February, Panama and Costa Rica took in hundreds of deportees from countries in Africa and Central Asia and imprisoned them in hotels, a jungle camp, and a detention center. *Id.*; Vanessa Buschschluter, *Costa Rican court orders release of migrants deported from U.S.*, BBC (Jun. 25, 2025). On July 4, 2025, ICE deported eight men, including one pre-1995 Vietnamese refugee, to South Sudan. *See* Wong, *supra*. On July 15, ICE deported five men to the tiny African nation of Eswatini, including one man from Vietnam, where they are reportedly being held in solitary confinement. Gerald Imray, *3 Deported by US held in African Prison Despite Completing Sentences, Lawyers Say*, PBS (Sept. 2, 2025). Many of these countries are known for human rights abuses or instability. For instance, conditions in South Sudan are so extreme that the U.S. State Department website warns Americans not to travel there, and if they do, to prepare their will, make funeral arrangements, and appoint a hostage-taker negotiator first. *See* Wong, *supra*.

On June 23 and July 3, 2025, the Supreme Court issued a stay of a national class-wide preliminary injunction issued in *D.V.D. v. U.S. Department of Homeland Security*, No. CV 25-10676-BEM, 2025 WL 1142968, at *1, 3 (D.

Mass. Apr. 18, 2025), which required ICE to follow statutory and constitutional requirements before removing an individual to a third country. *U.S. Dep't of Homeland Sec. v. D.V.D.*, 145 S. Ct. 2153 (2025) (mem.); *id.*, No. 24A1153, 2025 WL 1832186 (U.S. July 3, 2025).[8] On July 9, 2025, ICE rescinded previous guidance meant to give immigrants a "'meaningful opportunity' to assert claims for protection under the Convention Against Torture (CAT) before initiating removal to a third country" like the ones just described. Exh. B.

Under the new guidance, ICE may remove any immigrant to a third country "without the need for further procedures," as long as—in the view of the State Department—the United States has received "credible" "assurances" from that country that deportees will not be persecuted or tortured. *Id.* at 1. If a country fails to credibly promise not to persecute or torture releasees, ICE may still remove immigrants there with minimal notice. *Id.* Ordinarily, ICE must provide 24 hours' notice. But "[i]n exigent circumstances," a removal may take place in as little as six hours, "as long as the alien is provided reasonably means and opportunity to speak with an attorney prior to the removal." *Id.*

Upon serving notice, ICE "will not affirmatively ask whether the alien is afraid of being removed to the country of removal." *Id.* (emphasis original). If the noncitizen "does not affirmatively state a fear of persecution or torture if removed to the country of removal listed on the Notice of Removal within 24 hours, [ICE] may proceed with removal to the country identified on the notice." *Id.* at 2. If the noncitizen "does affirmatively state a fear if removed to the country of removal"

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[8] Though the Supreme Court's order was unreasoned, the dissent noted that the government had sought a stay based on procedural arguments applicable only to class actions. *Dep't of Homeland Sec. v. D.V.D.*, 145 S. Ct. 2153, 2160 (2025) (Sotomayor, J., dissenting). Thus, "even if the Government [was] correct that classwide relief was impermissible" in *D.V.D.*, Respondents still "remain[] obligated to comply with orders enjoining [their] conduct with respect to individual plaintiffs" like Mr. Vu. *Id.* In short, the Supreme Court's decision does not override this Court's authority to grant individual injunctive relief. *See Nguyen v. Scott*, No. 2:25-CV-01398, 2025 WL 2419288, at *20–23 (W.D. Wash. Aug. 21, 2025).

then ICE will refer the case to U.S. Citizenship and Immigration Services ("USCIS") for a screening for eligibility for withholding of removal and protection under the Convention Against Torture ("CAT"). *Id.* at 2. "USCIS will generally screen within 24 hours." *Id.* If USCIS determines that the noncitizen does not meet the standard, the individual will be removed. *Id.* If USCIS determines that the noncitizen has met the standard, then the policy directs ICE to either move to reopen removal proceedings "for the sole purpose of determining eligibility for [withholding of removal protection] and CAT" or designate another country for removal. *Id.*

CLAIMS FOR RELIEF

This Court should grant this petition and order Mr. Vu's immediate release. *Zadvydas v. Davis* holds that immigration statutes do not authorize the government to detain immigrants like Mr. Vu, for whom there is "no significant likelihood of removal in the reasonably foreseeable future." 533 U.S. 678, 701 (2001). ICE's own regulations require changed circumstances before re-detention, as well as a chance to contest a re-detention decision. And due process requires ICE to provide notice and an opportunity to be heard before any removal to a third country.

I. Count 1: Mr. Vu's detention violates *Zadvydas* and 8 U.S.C. § 1231.

A. Legal background

In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court considered a problem affecting people like Mr. Vu: Federal law requires ICE to detain an immigrant during the "removal period," which typically spans the first 90 days after the immigrant is ordered removed. 8 U.S.C. § 1231(a)(1)-(2). After that 90-day removal period expires, detention becomes discretionary—ICE may detain the migrant while continuing to try to remove them. *Id.* § 1231(a)(6). Ordinarily, this scheme would not lead to excessive detention, as removal happens within

days or weeks. But some detainees cannot be removed quickly. Perhaps their removal "simply require[s] more time for processing," or they are "ordered removed to countries with whom the United States does not have a repatriation agreement," or their countries "refuse to take them," or they are "effectively 'stateless' because of their race and/or place of birth." *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1104 (9th Cir. 2001). In these and other circumstances, detained immigrants can find themselves trapped in detention for months, years, decades, or even the rest of their lives.

If federal law were understood to allow for "indefinite, perhaps permanent, detention," it would pose "a serious constitutional threat." *Zadvydas*, 533 U.S. at 699. In *Zadvydas*, the Supreme Court avoided the constitutional concern by interpreting § 1231(a)(6) to incorporate implicit limits. *Id.* at 689.

As an initial matter, *Zadvydas* held that detention is "presumptively reasonable" for at least six months. *Id.* at 701. This acts as a kind of grace period for effectuating removals.

Following the six-month grace period, courts must use a burden-shifting framework to decide whether detention remains authorized. First, the petitioner must make a prima facie case for relief: He must prove that there is "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.*

If he does so, the burden shifts to "the Government [to] respond with evidence sufficient to rebut that showing." *Id.* Ultimately, then, the burden of proof rests with the government: The government must prove that there is a "significant likelihood of removal in the reasonably foreseeable future," or the immigrant must be released. *Id.*

Using this framework, Mr. Vu can make all the threshold showings needed to shift the burden to the government.

B. The six-month grace period has expired.

As an initial matter, the six-month grace period has long since ended. The *Zadvydas* grace period lasts for "*six months* after a final order of removal—that is, *three months* after the statutory removal period has ended." *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1102 n.5 (9th Cir. 2001). Here, Mr. Vu's order of removal was entered in May 2000. Exh. A at ¶ 3. According to Executive Office for Immigration Review ("EOIR") records, Mr. Vu also appealed to the BIA, and the appeal was completed on September 29, 2000.[9] Accordingly, his 90-day removal period began then. 8 U.S.C. § 1231(a)(1)(B). The *Zadvydas* grace period thus expired six months after the appeal finished and three months after the removal period ended, both of which occurred in March 2001. Furthermore, Mr. Vu was detained for 10 months in 2000 and 2001, and he has been detained for about a month and a half in 2025. Exh. A at ¶¶ 3, 4, 7; Exh. C. Thus, this threshold requirement is met.

The government has sometimes proposed calculating the *Zadvydas* grace period differently where, as here, an immigrant is released and then rearrested. But these proposed alternative calculations contradict the statute and *Zadvydas*.

First, the government has sometimes argued that release and rearrest resets the six-month grace period completely, taking the clock back to zero. "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). This proposal would create an obvious end run around *Zadvydas*, because ICE could detain an immigrant indefinitely by releasing and quickly rearresting them every six months.

[9] EOIR, *Automated Case Information*, https://acis.eoir.justice.gov/en/.

Second, the government has sometimes claimed that rearrest at least resets the 90-day removal period under 8 U.S.C. § 1231(a)(1). *See, e.g.*, *Farah v. INS*, No. Civ. 02-4725(DSD/RLE), 2003 WL 221809, at *5 (D. Minn. Jan. 29, 2013) (adopting this view). But as a court explained in *Bailey v. Lynch*, that view cannot be squared with the statutory definition of the removal period in 8 U.S.C. § 1231(a)(1)(B). No. CV 16-2600 (JLL), 2016 WL 5791407, at *2 (D.N.J. Oct. 3, 2016). "Pursuant to the statute, the removal period, and in turn the [six-month] presumptively reasonable period, begins from the latest of 'the date the order of removal becomes administratively final,' the date of a reviewing court's final order where the removal order is judicially removed and that court orders a stay of removal, or the alien's release from detention or confinement where he was detained for reasons other than immigration purposes at the time of his final order of removal." *Id.* None of these statutory starting points have anything to do with whether or when an immigrant is detained. *See id.* Because the statutorily-defined removal period has nothing to do with release and rearrest, releasing and rearresting the immigrant cannot reset the removal period.

For all these reasons, the six-month grace period poses no barrier to granting this *Zadvydas* petition.

C. Vietnam's decades-long policy of not repatriating most pre-1995 Vietnamese immigrants provides very good reason to believe that Mr. Vu will not likely be removed in the reasonably foreseeable future.

Because the six-month grace period has passed, this Court must evaluate Mr. Vu's *Zadvydas* claim using the burden-shifting framework. At the first stage of the framework, Mr. Vu must "provide[] good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." *Zadvydas*, 533 U.S. at 701. This standard can be broken down into three parts.

"Good reason to believe." The "good reason to believe" standard is a relatively forgiving one. "A petitioner need not establish that there exists no possibility of removal." *Freeman v. Watkins*, No. CV B:09-160, 2009 WL 10714999, at *3 (S.D. Tex. Dec. 22, 2009). Nor does "'[g]ood reason to believe' . . . place a burden upon the detainee to demonstrate no reasonably foreseeable, significant likelihood of removal or show that his detention is indefinite; it is something less than that." *Rual v. Barr*, No. 6:20-CV-06215 EAW, 2020 WL 3972319, at *3 (W.D.N.Y. July 14, 2020) (quoting *Senor v. Barr*, 401 F. Supp. 3d 420, 430 (W.D.N.Y. 2019)). In short, the standard means what it says: Petitioners need only give a "good reason"—not prove anything to a certainty.

"Significant likelihood of removal." This component focuses on <u>whether</u> Mr. Vu will likely be removed: Continued detention is permissible only if it is "significant[ly] like[ly]" that ICE will be able to remove him. *Zadvydas*, 533 U.S. at 701. This inquiry targets "not only the *existence* of untapped possibilities, but also [the] probability of *success* in such possibilities." *Elashi v. Sabol*, 714 F. Supp. 2d 502, 506 (M.D. Pa. 2010) (second emphasis added). In other words, even if "there remains *some* possibility of removal," a petitioner can still meet its burden if there is good reason to believe that successful removal is not significantly likely. *Kacanic v. Elwood*, No. CIV.A. 02-8019, 2002 WL 31520362, at *4 (E.D. Pa. Nov. 8, 2002) (emphasis added).

"In the reasonably foreseeable future." This component of the test focuses on <u>when</u> Mr. Vu will likely be removed: Continued detention is permissible only if removal is likely to happen "in the reasonably foreseeable future." *Zadvydas*, 533 U.S. at 701. This inquiry places a time limit on ICE's removal efforts. If the Court has "no idea of when it might reasonably expect [Petitioner] to be repatriated, this Court certainly cannot conclude that his removal is likely to occur—or even that it might occur—in the reasonably foreseeable future." *Palma v. Gillis*, No. 5:19-CV-112-DCB-MTP, 2020 WL 4880158, at *3

(S.D. Miss. July 7, 2020), *report and recommendation adopted*, 2020 WL 4876859 (S.D. Miss. Aug. 19, 2020) (quoting *Singh v. Whitaker*, 362 F. Supp. 3d 93, 102 (W.D.N.Y. 2019)). Thus, even if this Court concludes that Mr. Vu "would *eventually* receive" a travel document, he can still meet his burden by giving good reason to anticipate sufficiently lengthy delays. *Younes v. Lynch*, 2016 WL 6679830, at *2 (E.D. Mich. Nov. 14, 2016).

Mr. Vu readily satisfies this standard for two reasons.

First, as explained above, Vietnam generally does not accept pre-1995 Vietnamese immigrants for deportation. Even after Vietnam signed the 2020 MOU, ICE had to admit that there was no reasonable likelihood of removing such immigrants in the reasonably foreseeable future, Order on Joint Motion for Entry of Stipulated Dismissal, *Trihn*, 18-CV-316-CJC-GJS, Dkt. 161 at 3 (C.D. Cal. Oct. 7, 2021)—an admission amply backed up by two years' experience under the MOU, Asian Law Caucus, *Resources on Deportation of Vietnamese Immigrants Who Entered the U.S. Before 1995* (Jul. 15, 2025) (providing links to all quarterly reports). Though the Trump administration rescinded this admission, *Nguyen*, 2025 WL 2419288, at *7, there is no evidence that facts on the ground have changed. Thus, several courts have found that these barriers continue to obstruct removal for people like Mr. Vu. *See Nguyen*, 2025 WL 2419288; *Hoac*, 2025 WL 1993771; *Nguyen*, 2025 WL 1725791.

Second, Mr. Vu's own experience bears this out. ICE has now had 25 years to deport him, including 5 years under the MOU. He has fully cooperated with ICE's removal efforts throughout that time, including at yearly check-ins. Exh. A ¶¶ 5, 10. Yet ICE has proved unable to remove him.

Thus, Mr. Vu has met his initial burden, and the burden shifts to the government. Unless the government can prove a "significant likelihood of removal in the reasonably foreseeable future," Mr. Vu must be released. *Zadvydas*, 533 U.S. at 701.

D. *Zadvydas* unambiguously prohibits this Court from denying Mr. Vu's petition because of his criminal history.

If released on supervision, Mr. Vu poses no risk of danger or flight. He has been on supervision for about 24 years. Exh. A at ¶ 4; Exh. C. During that time, he has committed himself to being a single dad for his five kids, including his two children with autism. Exh. A at ¶ 11. Apart from the 2018 incident, for which he served one day in jail, he has sustained no convictions. *Id.* at ¶ 6. And he has checked in regularly with ICE for almost two decades. *Id.* at ¶ 5.

Even if the government did try to argue that Mr. Vu posed a danger or flight risk, however, *Zadvydas* squarely holds that those are not grounds for detaining an immigrant when there is no reasonable likelihood of removal in the reasonably foreseeable future. 533 U.S. at 684–91.

The two petitioners in *Zadvydas* both had significant criminal history. Mr. Zadvydas himself had "a long criminal record, involving drug crimes, attempted robbery, attempted burglary, and theft," as well as "a history of flight, from both criminal and deportation proceedings." *Id.* at 684. The other petitioner, Kim Ho Ma, was "involved in a gang-related shooting [and] convicted of manslaughter." *Id.* at 685. The government argued that both men could be detained regardless of their likelihood of removal, because they posed too great a risk of danger or flight. *Id.* at 690–91.

The Supreme Court rejected that argument. The Court appreciated the seriousness of the government's concerns. *Id.* at 691. But the Court found that the immigrant's liberty interests were weightier. *Id.* The Court had never countenanced "potentially permanent" "civil confinement," based only on the government's belief that the person would misbehave in the future. *Id.*

The Court also noted that the government was free to use the many tools at its disposal to mitigate risk: "[O]f course, the alien's release may and should be conditioned on any of the various forms of supervised release that are appropriate

in the circumstances, and the alien may no doubt be returned to custody upon a violation of those conditions." *Id.* at 700. The Ninth Circuit later elaborated, "All aliens ordered released must comply with the stringent supervision requirements set out in 8 U.S.C. § 1231(a)(3). [They] will have to appear before an immigration officer periodically, answer certain questions, submit to medical or psychiatric testing as necessary, and accept reasonable restrictions on [their] conduct and activities, including severe travel limitations. More important, if [they] engage[ ] in any criminal activity during this time, including violation of [their] supervisory release conditions, [they] can be detained and incarcerated as part of the normal criminal process." *Ma*, 257 F.3d at 1115.

These conditions have proved sufficient to protect the public over the last 24 years. They will continue to do so while ICE keeps trying to deport Mr. Vu.

II. Count 2: ICE failed to comply with its own regulations before re-detaining Mr. Vu, violating his rights under the Fifth Amendment and the Administrative Procedures Act.

In addition to *Zadvydas*'s protections, a series of regulations provide extra process for someone who, like Mr. Vu, is re-detained following a period of release. Title 8 C.F.R. § 241.4(*l*) applies to re-detention generally, while 8 C.F.R. § 241.13(i) applies to persons released after providing good reason to believe that they will not be removed in the reasonably foreseeable future, *see Rokhfirooz v. Larose*, No. 25-CV-2053-RSH-VET, 2025 WL 2646165, at *2 (S.D. Cal. Sept. 15, 2025), as Mr. Vu plainly was, *see* Exh. C.

These regulations permit an official to "return[s] [the person] to custody" because they "violate[d] any of the conditions of release." 8 C.F.R. § 241.13(i)(1); *see also id.* § 241.4(*l*)(1). Otherwise, they permit revocation of release only if the appropriate official (1) "determines that there is a significant likelihood that the alien may be removed in the reasonably foreseeable future," *id.* § 241.13(i)(2), and (2) makes that finding "on account of changed circumstances." *Id.*

No matter the reason for re-detention, the re-detained person is entitled to "an initial informal interview promptly," during which they "will be notified of the reasons for revocation." *Id.* §§ 241.4(*l*)(1), 241.13(i)(3). The interviewer must "afford[] the [person] an opportunity to respond to the reasons for revocation," allowing them to "submit any evidence or information" relevant to re-detention and evaluating "any contested facts." *Id.*

ICE is required to follow its own regulations. *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."). A court may review a re-detention decision for compliance with the regulations. *See Phan v. Beccerra*, No. 2:25-CV-01757, 2025 WL 1993735, 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) (citing *Kong v. United States*, 62 F.4th 608, 620 (1st Cir. 2023)).

None of the prerequisites to detention apply here. Mr. Vu was not returned to custody because of a conditions violation. And there are no changed circumstances that justify re-detaining him. The same treaty has applied since 2008, and the same MOU has applied since 2020. Of course, ICE may be planning to try again to remove Mr. Vu. But absent any evidence for "why obtaining a travel document is more likely this time around[,] Respondents' intent to eventually complete a travel document request for Petitioner does not constitute a changed circumstance." *Hoac v. Becerra*, No. 2:25-CV-01740-DC-JDP, 2025 WL 1993771, at *4 (E.D. Cal. July 16, 2025) (citing *Liu v. Carter*, No. 25-3036-JWL, 2025 WL 1696526, at *2 (D. Kan. June 17, 2025)). Nor has Mr. Vu received the interview required by regulation. Exh. A at ¶ 9. No one from ICE has ever invited him to contest his detention. *Id.*

Numerous courts have released re-detained immigrants after finding that ICE failed to comply with applicable regulations. *Ceesay v. Kurzdorfer*, 781 F. Supp.

3d 137, 166 (W.D.N.Y. 2025); *You v. Nielsen*, 321 F. Supp. 3d 451, 463 (S.D.N.Y. 2018); *Rombot v. Souza*, 296 F. Supp. 3d 383, 387 (D. Mass. 2017); *Zhu v. Genalo*, No. 1:25-CV-06523 (JLR), 2025 WL 2452352, at *7–9 (S.D.N.Y. Aug. 26, 2025); *M.S.L. v. Bostock*, No. 6:25-CV-01204-AA, 2025 WL 2430267, at *10–12 (D. Or. Aug. 21, 2025); *Escalante v. Noem*, No. 9:25-CV-00182-MJT, 2025 WL 2491782, at *2–3 (E.D. Tex. July 18, 2025); *Hoac v. Becerra*, No. 2:25-cv-01740-DC-JDP, 2025 WL 1993771, at *4 (E.D. Cal. July 16, 2025); *Liu*, 2025 WL 1696526, at *2; *M.Q. v. United States*, 2025 WL 965810, at *3, *5 n.1 (S.D.N.Y. Mar. 31, 2025). That includes Judge Huie earlier this month. *Rokhfirooz*, 2025 WL 2646165.

"[B]ecause officials did not properly revoke petitioner's release pursuant to the applicable regulations, that revocation has no effect, and [Mr. Vu] is entitled to his release (subject to the same Order of Supervision that governed his most recent release)." *Liu*, 2025 WL 1696526, at *3.

III. Count 3: ICE may not remove Mr. Vu to a third country without adequate notice and an opportunity to be heard.

In addition to unlawfully detaining him, ICE's policies threaten his removal to a third country without adequate notice and an opportunity to be heard. These policies violate the Fifth Amendment, the Convention Against Torture, and implementing regulations.

A. Legal background

U.S. law enshrines protections against dangerous and life-threatening removal decisions. By statute, the government is prohibited from removing an immigrant to any third country where they may be persecuted or tortured, a form of protection known as withholding of removal. *See* 8 U.S.C. § 1231(b)(3)(A). The government "may not remove [a noncitizen] to a country if the Attorney General decides that the [noncitizen's] life or freedom would be threatened in that country because of the [noncitizen's] race, religion, nationality, membership in a particular

social group, or political opinion." *Id.*; *see also* 8 C.F.R. §§ 208.16, 1208.16. Withholding of removal is a mandatory protection.

Similarly, Congress codified protections enshrined in the CAT prohibiting the government from removing a person to a country where they would be tortured. *See* FARRA 2681-822 (codified as 8 U.S.C. § 1231 note) ("It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States."); 28 C.F.R. § 200.1; *id.* §§ 208.16-208.18, 1208.16-1208.18. CAT protection is also mandatory.

To comport with the requirements of due process, the government must provide notice of the third country removal and an opportunity to respond. Due process requires "written notice of the country being designated" and "the statutory basis for the designation, i.e., the applicable subsection of § 1231(b)(2)." *Aden v. Nielsen*, 409 F. Supp. 3d 998, 1019 (W.D. Wash. 2019); *accord 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); *Andriasian v. INS*, 180 F.3d 1033, 1041 (9th Cir. 1999).

The government must also "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 information from the noncitizen to comply with section 1231(b)(3) and avoids [a dispute about what the officer and noncitizen said]." *Aden*, 409 F. Supp. 3d at 1019. "Failing to notify individuals who are subject to deportation that they have the right to apply for asylum in the United States and for withholding of deportation to the country to which they will be deported violates both INS regulations and the constitutional right to due process." *Andriasian*, 180 F.3d at 1041.

If the noncitizen claims fear, measures must be taken to ensure that the noncitizen can seek asylum, withholding, and relief under CAT before an immigration judge in reopened removal proceedings. The amount and type of notice must be "sufficient" to ensure that "given [a noncitizen's] capacities and circumstances, he would have a reasonable opportunity to raise and pursue his claim for withholding of deportation." *Aden*, 409 F. Supp. 3d at 1009 (citing *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) and *Kossov v. I.N.S.*, 132 F.3d 405, 408 (7th Cir. 1998)); *cf. D.V.D.*, 2025 WL 1453640, at *1 (requiring the government to move to reopen the noncitizen's immigration proceedings if the individual demonstrates "reasonable fear" and to provide "a meaningful opportunity, and a minimum of fifteen days, for the non-citizen to seek reopening of their immigration proceedings" if the noncitizen is found to not have demonstrated "reasonable fear"); *Aden*, 409 F. Supp. 3d at 1019 (requiring notice and time for a respondent to file a motion to reopen and seek relief).

"[L]ast minute" notice of the country of removal will not suffice, *Andriasian*, 180 F.3d at 1041; *accord Najjar v. Lunch*, 630 Fed. App'x 724 (9th Cir. 2016), and for good reason: To have a meaningful opportunity to apply for fear-based protection from removal, immigrants must have time to prepare and present relevant arguments and evidence. Merely telling a person where they may be sent, without giving them a chance to look into country conditions, does not give them a meaningful chance to determine whether and why they have a credible fear.

B. The June 6, 2025 memo's removal policies violate the Fifth Amendment, 8 U.S.C. § 1231, the Conviction Against Torture, and Implementing Regulations.

The policies in the June 6, 2025 memo do not adhere to these requirements. First, under the policy, ICE need not give immigrants *any* notice or *any* opportunity to be heard before removing them to a country that—in the State Department's estimation—has provided "credible" "assurances" against persecution and torture.

Exh. B. By depriving immigrants of any chance to challenge the State Department's view, this policy violates "[t]he essence of due process," "the requirement that a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it." *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (cleaned up).

Second, even when the government has obtained no credible assurances against persecution and torture, the government can still remove the person with between 6 and 24 hours' notice, depending on the circumstances. Exh. B. Practically speaking, there is not nearly enough time for a detained person to assess their risk in the third country and martial evidence to support any credible fear—let alone a chance to file a motion to reopen with an IJ. An immigrant may know nothing about a third country, like Eswatini or South Sudan, when they are scheduled for removal there. Yet if given the opportunity to investigate conditions, immigrants would find credible reasons to fear persecution or torture—like patterns of keeping deportees indefinitely and without charge in solitary confinement or extreme instability raising a high likelihood of death—in many of the third countries that have agreed to removal thus far. Due process requires an adequate chance to identify and raise these threats to health and life. This Court must prohibit the government from removing Mr. Vu without these due process safeguards.

IV. This Court must hold an evidentiary hearing on any disputed facts.

Resolution of a prolonged-detention habeas petition may require an evidentiary hearing. *Owino v. Napolitano*, 575 F.3d 952, 956 (9th Cir. 2009). Mr. Vu hereby requests such a hearing on any material, disputed facts.

V. Prayer for relief

For the foregoing reasons, Petitioner respectfully requests that this Court:

1. Order Respondents to immediately release Petitioner from custody;

2. Enjoin Respondents from re-detaining Petitioner under 8 U.S.C. § 1231(a)(6) unless and until Respondents obtain a travel document for his removal;

3. Enjoin Respondents from re-detaining Petitioner without first following all procedures set forth in 8 C.F.R. §§ 241.4(*l*), 241.13(i), and any other applicable statutory and regulatory procedures;

4. Enjoin Respondents from removing Petitioner to any country other than Vietnam, unless they provide the following process, *see D.V.D. v. U.S. Dep't of Homeland Sec.*, No. CV 25-10676-BEM, 2025 WL 1453640, at *1 (D. Mass. May 21, 2025):

   a. written notice to both Petitioner and Petitioner's counsel in a language Petitioner can understand;

   b. a meaningful opportunity, and a minimum of ten days, to raise a fear-based claim for CAT protection prior to removal;

   c. if Petitioner is found to have demonstrated "reasonable fear" of removal to the country, Respondents must move to reopen Petitioner's immigration proceedings;

   d. if Petitioner is not found to have demonstrated a "reasonable fear" of removal to the country, a meaningful opportunity, and a minimum of fifteen days, for the Petitioner to seek reopening of his immigration proceedings.

5. Order all other relief that the Court deems just and proper.

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Conclusion

For those reasons, this Court should grant this habeas petition.

DATED: 9-28-25

Respectfully submitted,

HIEN VU

Petitioner

PROOF OF SERVICE

I, the undersigned, will cause the attached Petition for a Writ of Habeas Corpus to be emailed to Janet Cabral, janet.cabral@usdoj.gov, when I receive the court-stamped copy.

Date: 9/30/2025

/s/ *Katie Hurrelbrink*
Katie Hurrelbrink

Exhibit A

Hien Vu
A# [redacted]
Otay Mesa Detention Center
P.O. Box 439049
San Diego, CA 92143-9049

Pro Se[1]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HIEN VU,

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.:

First Declaration of Hien Vu

I, Hien Vu, declare:

1. My name is Hien Vu. ICE has misspelled my name on my paperwork—they spell it "Hein Vu."

[1] Mr. Vu is filing this petition for a writ of habeas corpus and all associated documents with the assistance of the Federal Defenders of San Diego, Inc. Federal Defenders has consistently used this procedure in seeking appointment for immigration habeas cases. The Declaration of Katie Hurrelbrink in Support of Appointment Motion attaches case examples.

2. I came to the United States in 1984 with my mom and dad. We were refugees fleeing Vietnam. My aunt sponsored us to come here. We came to live with her in San Jose, California. We got green cards.

3. In 1997, I got arrested for second degree robbery. I was then ordered removed on May 1, 2000.

4. Immigration detained me until I filed a habeas corpus petition. They finally released me because they could not remove me to Vietnam.

5. Every year since 2006, I have reported to ICE as scheduled.

6. In 2013, I took my daughter to my son's Individualized Education Plan appointment at the school. She said that she was tired, so she laid down and took a nap in the car. School employees called the police because they worried that she would overheat. She was taken to the hospital as a precaution, but she was ok and she went home the same day. I spent one day in county jail before I was bailed out. As I understood it, it was decided that if I did not get the same conviction for five years, the case would be erased and it wouldn't show on my record any more.

7. I was re-detained at my yearly check-in on August 14, 2025.

8. I have had no formal meetings with a deportation officer since then. I only had an informal conversation with a DO in my pod, and she didn't really know anything about my case.

9. ICE has never given me any formal paperwork explaining why I was re-

detained or identifying changed circumstances that would make my removal easier. I have never gotten a chance to tell ICE why I should not be re-detained.

10. I have never refused to do something that ICE asked me to do.

11. I have five kids. Both of my parents passed away. The kids' mom is not in the picture. My girlfriend is having to support my kids while I'm custody. Two of my kids have autism. It is extremely difficult for the family to get by without me. My kids are suffering.

12. I have approximately $3,500 in the bank. One of my kids with autism gets some benefits from the state, but they're all used to take care of him. My income since I have been detained has been used to help my girlfriend support my kids. I do not think that I can afford a lawyer.

13. I have no legal training. I do not know anything about immigration law. I do not have unrestricted access to the internet at my detention facility, so I cannot use the internet to research ICE's and Vietnam's latest polices for people like me. I do not think that I can do a habeas petition on my own.

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I declare under penalty of perjury that the foregoing is true and correct, executed on 9-28-25, in San Diego, California.

HIEN VU
Declarant

Exhibit B

To All ICE Employees
July 9, 2025

Third Country Removals Following the Supreme Court's Order in *Department of Homeland Security v. D.V.D.*, No. 24A1153 (U.S. June 23, 2025)

On June 23, 2025, the U.S. Supreme Court granted the Government's application to stay the district court's nationwide preliminary injunction in *D.V.D. v. Department of Homeland Security*, No. 25-10676, 2025 WL 1142968 (D. Mass. Apr. 18, 2025), which required certain procedures related to providing a "meaningful opportunity" to assert claims for protection under the Convention Against Torture (CAT) before initiating removal to a third country. Accordingly, all previous guidance implementing the district court's preliminary injunction related the third country removals issued in *D.V.D.* is hereby rescinded. Absent additional action by the Supreme Court, the stay will remain in place until any writ of certiorari is denied or a judgment following any decision issues.

Effective immediately, when seeking to remove an alien with a final order of removal—other than an expedited removal order under section 235(b) of the Immigration and Nationality Act (INA)—to an alternative country as identified in section 241(b)(1)(C) of the INA, ICE must adhere to Secretary of Homeland Security Kristi Noem's March 30, 2025 memorandum, *Guidance Regarding Third Country Removals*, as detailed below. A "third country" or "alternative country" refers to a country other than that specifically referenced in the order of removal.

If the United States has received diplomatic assurances from the country of removal that aliens removed from the United States will not be persecuted or tortured, and if the Department of State believes those assurances to be credible, the alien may be removed without the need for further procedures. ICE will seek written confirmation from the Department of State that such diplomatic assurances were received and determined to be credible. HSI and ERO will be made aware of any such assurances. In all other cases, ICE must comply with the following procedures:

- An ERO officer will serve on the alien the attached Notice of Removal. The notice includes the intended country of removal and will be read to the alien in a language he or she understands.
- ERO will not affirmatively ask whether the alien is afraid of being removed to the country of removal.
- ERO will generally wait at least 24 hours following service of the Notice of Removal before effectuating removal. In exigent circumstances, ERO may execute a removal order six (6) or more hours after service of the Notice of Removal as long as the alien is provided reasonable means and opportunity to speak with an attorney prior to removal.
    - Any determination to execute a removal order under exigent circumstances less than 24 hours following service of the Notice of Removal must be approved by the DHS General Counsel, or the Principal Legal Advisor where the DHS General Counsel is not available.

- If the alien does not affirmatively state a fear of persecution or torture if removed to the country of removal listed on the Notice of Removal within 24 hours, ERO may proceed with removal to the country identified on the notice. ERO should check all systems for motions as close in time as possible to removal.
- If the alien does affirmatively state a fear if removed to the country of removal listed on the Notice of Removal, ERO will refer the case to U.S. Citizenship and Immigration Services (USCIS) for a screening for eligibility for protection under section 241(b)(3) of the INA and the Convention Against Torture (CAT). USCIS will generally screen the alien within 24 hours of referral.
    - USCIS will determine whether the alien would more likely than not be persecuted on a statutorily protected ground or tortured in the country of removal.
    - If USCIS determines that the alien has not met this standard, the alien will be removed.
    - If USCIS determines that the alien has met this standard and the alien was not previously in proceedings before the immigration court, USCIS will refer the matter to the immigration court for further proceedings. In cases where the alien was previously in proceedings before the immigration court, USCIS will notify the referring immigration officer of its finding, and the immigration officer will inform ICE. In such cases, ERO will alert their local Office of the Principal Legal Advisor (OPLA) Field Location to file a motion to reopen with the immigration court or the Board of Immigration Appeals, as appropriate, for further proceedings for the sole purpose of determining eligibility for protection under section 241(b)(3) of the INA and CAT for the country of removal. Alternatively, ICE may choose to designate another country for removal.

Notably, the Supreme Court's stay of removal does not alter any decisions issued by any other courts as to individual aliens regarding the process that must be provided before removing that alien to a third country.

Please direct any questions about this guidance to your OPLA field location.

Thank you for all you continue to do for the agency.

Todd M. Lyons
Acting Director
U.S. Immigration and Customs Enforcement

Attachments:

- U.S. Supreme Court Order
- Secretary Noem's Memorandum
- Notice of Removal

Exhibit C

ANDY 8/6/01 14:49
3:01-CV-00188 BINH V. INS
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O.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

TRAN BINH et al.,

Petitioners,

vs.

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE and ADELE FASANO, INS DISTRICT DIRECTOR FOR THE SAN DIEGO DISTRICT,

Respondents.

CASE NO. 01-CV-0188 W (AJB)

ORDER GRANTING WRIT OF HABEAS CORPUS

Petitioners Tran Binh, Bieu Bonney, Sam Chaymnan, Hoang Doan, Saetum Chio Hin, Sang Ker, Tien Chi Le, Thinh Luong, Ror Math, Choung Nguyen, Dung Nguyen, Hiep Nguyen, Tuan Van Nguyen, Tuong Van Nguyen, Le Boa Quoc, Kim Sean Sang, Boonpet Sayavong, Phiet Sork, Samorn Sucharoun, Chanthala Thammavongsa, Latana Thephommy, Hoa Tran, Yo Trang, Dien Phong Vo, Chien Dinh Hu, Hien Vu and Kou Xiong (collectively, "Petitioners") bring this ex parte

motion challenging their continued detention by the Immigration and Naturalization Service ("INS"). For the following reasons, Petitioners' motion is **GRANTED**.

I. BACKGROUND

Petitioners are former lawful permanent United States residents who have been ordered deported or removed to their native countries of Vietnam, Laos or Cambodia. The INS is currently detaining Petitioners pursuant to the Illegal Immigrant Reform and Immigrant Responsibility Act ("IIRIRA"); specifically, the 8 U.S.C. § 1231(a)(6) post-removal period detention provision. Petitioners have been detained beyond the ninety-day statutory removal period set forth in § 1231(a)(6), as the most recent removal order became final on November 1, 2000.

On February 1, 2001 Petitioners applied to this Court for a writ of habeas corpus challenging the INS' alleged unlawful detention. By order dated May 1, 2001 the Court stayed Petitioners' habeas action pending the United States Supreme Court's decision concerning indefinite post-removal period detention. On June 28, 2001 the Supreme Court handed down Zadvydas v. Davis, et al.[1], and held that unless an alien's removal is reasonably foreseeable, that alien's continued detention for more than 180 days beyond the ninety-day statutory removal period is unreasonable and unauthorized by the post-removal period detention statute. Id. at 2505. Petitioners now bring the instant ex parte motion for immediate habeas relief and release.

II. DISCUSSION

Petitioners have each been ordered removed from the United States pursuant to 8 U.S.C. § 1227(a)(2) due to their prior criminal convictions and are currently in INS custody awaiting removal. The issue before this Court is whether Petitioners' deportation or removal to their native countries is reasonably foreseeable such that § 1231(a)(6) authorizes their continued detention beyond the ninety-day statutory removal period. If such deportation or removal is not reasonably foreseeable, Petitioners' continued detention by the INS is unreasonable and the INS must effect

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[1] 121 S.Ct. 2491, 2001 WL 720662 (June 28, 2001).

Petitioners' release.

8 U.S.C. § 1231(a)(6) provides that certain categories of aliens who have been ordered removed, including those who have criminal convictions mandating their removal, may be detained for longer than the ninety-day statutory removal period. However, continued detention is subject to constitutional due process limitations including the protection of a detainee's liberty interest. In Zadvydas, the Supreme Court found that in light of constitutional principles, "the statute ... limits an alien's post-removal period detention to a period reasonably necessary to bring about that alien's removal from the United States. *It does not permit indefinite detention.*" Zadvydas, 121 S.Ct. at 2498 (emphasis added). Accordingly, an alien "may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." Id. at 2505. However, detention under § 1231(a)(6) beyond the ninety-day removal period is only presumptively reasonable for an additional 180 days. Id.

The basic federal habeas corpus statute authorizes the federal courts to determine whether continued detention is reasonably necessary to secure removal. Id. at 2504 (citing 28 U.S.C. § 2241(c)(3)). The alien bears the burden of proving that no significant likelihood of removal exists in the reasonably foreseeable future. Id. at 2505. If the Government cannot provide sufficient evidence to rebut that showing, the Government must release the alien. Id. Such release can be subject to supervision and other reasonable conditions. See 8 U.S.C. § 1231(a)(3).

Here, Petitioners argue that there is no significant likelihood of removal in the reasonably foreseeable future as no repatriation agreements currently exist between the United States and Vietnam, Laos and Cambodia. Petitioners further note that no such agreements are anticipated in the reasonably foreseeable future. Indeed, Petitioners provide evidence that INS officials have admitted that no repatriation agreements are in place with Vietnam or Laos, though the United States is currently in negotiations with both countries. (Pets.' Mot. Exs. 4-6.) The INS is reluctant even

to predict when such agreements might finalize. (Pets.' Mot. Ex. 6.) Moreover, even assuming that Vietnam and Laotian repatriation agreements eventually finalize, those countries' governments would likely not authorize the immediate repatriation of all Vietnamese and Laotian detainees held in the United States. (Id.) Finally, the Cambodian government expressly declined to issue travel documents to the Cambodian Petitioners as no repatriation agreement exists between the United States and Cambodia, nor is such an agreement imminent. (Pets.' Mot. Exs. 6-9.)

The Court agrees with Petitioners' argument and finds that Petitioners' removal is not significantly likely in the reasonably foreseeable future. The United States does not have repatriation agreements in place with Petitioners' native countries, nor are such agreements imminent. INS officials' sworn declarations establish that the repatriation agreements are merely in the negotiation phase. The INS candidly describes the repatriation agreements as merely being "on the horizon." (INS Return at 4.) Though the United States continues to negotiate with Vietnam, Laos and Cambodia in efforts to create repatriation agreements, this is not enough to justify Petitioners' indefinite detention. Balanced against Petitioners' weighty due process rights and the mandate of Zadvydas, such negotiations are insufficient to create a significant likelihood of removal in the reasonably foreseeable future.

As Petitioners' removal is not reasonably foreseeable, the INS must effect their immediate release. Petitioners' removal orders were finalized on or before November 1, 2000. Thus, the INS has detained Petitioners beyond both the ninety-day statutory removal period and the 180-day post-removal period deemed presumptively reasonable in Zadvydas. The Court concludes that Petitioners' continued detention is unreasonable as removal is not significantly likely in the reasonably foreseeable future. Accordingly, the Court **GRANTS** Petitioners' ex parte motion for immediate habeas relief and release.

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III. CONCLUSION AND ORDER

For the foregoing reasons, the Court **GRANTS** Petitioners' § 2241 writ of habeas corpus. The INS District Director is **ORDERED** to release all Petitioners, subject to reasonable supervisory conditions (8 U.S.C. § 1231(a)(3)) , no later than **August 14, 2001**. Because Petitioners have secured their release from INS confinement, the Clerk of Court shall close the district court case file. The Court retains jurisdiction to enforce the writ.

IT IS SO ORDERED.

DATE: August 6, 2001

Hon. THOMAS J. WHELAN
United States District Court
Southern District of California

CC: ALL PARTIES AND COUNSEL OF RECORD