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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SOUKSAVATH PHAKEOKOTH,

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-2817-RBM-SBC

Traverse in Support of Petition for Writ of Habeas Corpus

INTRODUCTION

Having received the government's Return and exhibits, this Court should grant Mr. Phakeokoth's petition. To do so, the Court need only follow the reasoning of recent decisions in this district and around the country.

First, this Court should grant the petition on Claim One because the government has not complied with its own regulations. For persons like Mr. Phakeokoth, 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.*

Yet ICE did none of these things when it arrested Mr. Phakeokoth on August 28, 2025. Although it provided a Notice of Revocation of Release that vaguely claimed there were "changed circumstances," Dkt. 9-2, Exhibit 4, it never explained what those changed circumstances were. And though ICE purports to have interviewed. Mr. Phakeokoth on the day of his re-arrest, this interview did not allow him to "respond to the reasons for revocation," 8 C.F.R. § 241.13(i)(3), because the ICE officer said only that his supervision was revoked "due to the changing priorities of the agency." Dkt. 9-2, Exhibit 5. On top of it all, Mr. Phakeokoth suffers from schizophrenia, and ICE never claims to have made adequate accommodations to ensure that Mr. Phakeokoth understood the purported notice he was given.

Though ICE claims to have received a travel document for Mr. Phakeokoth, this does not defeat his habeas petition. Other judges in this district have granted a habeas and ordered the petitioner released due to the regulatory violations of 8 C.F.R. § 241.4 even *after* ICE obtained a travel document. *See, e.g., Truong v. Noem*, 25-cv-2597-JES-MMP, Dkt. 13 (S.D. Cal. Oct. 22, 2025) (granting habeas

because "the Government failed to follow its own regulations" even though ICE had obtained travel document); *Khambounheuang v. Noem*, 25-cv-2575-JO-SBC, Dkt. 17 (S.D. Cal. Oct. 23, 2025) (same); *Ngo v. Noem*, 25-cv-2739-TWR-MMP, Dkt. 11 (S.D. Cal. Oct. 23, 2025) (same); *Sphabmixay v. Noem*, 25-cv-2648-LL (S.D. Cal. Oct. 30, 2025) (same).

Second, this Court should grant the petition on Claim Two because the government provides insufficient evidence to satisfy the success element ("a significant likelihood of removal") or the timing element ("in the reasonably foreseeable future") of *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). The declaration of Deportation Officer Alexis Boada does not say when Mr. Phakeokoth will be removed—only that he "has been *nominated* to be *scheduled* for removal." Dkt. 9-1 at ¶ 10 (emphasis added). Moreover, this scheduling is "contingent upon flight availability and the completion of required notifications." Dkt. 9-1 at ¶ 10. And the government never explains how it will realistically be able to place an individual who suffers from schizophrenia and has not received his medication on a "commercial flight" lasting over 20 hours. Dkt. 9-1 at ¶ 10.

Third, the government does not dispute that ICE's third-country removal policy violates due process. And the Ninth Circuit has squarely rejected the government's jurisdictional argument, holding that § 1252(g) does not prohibit immigrants from asserting a "right to meaningful notice and an opportunity to present a fear-based claim before [they] [are] removed," or any other claim asserting a "violation of [ICE's] mandatory duties." *Ibarra-Perez v. United States*, __ F.4th __, 2025 WL 2461663, at *7, *9 (9th Cir. Aug. 27, 2025). The contrary position would leave immigrants without protection from ICE's policy, which allows for a change of plans with minimal or no notice. Multiple judges in this district have granted relief on this ground. *See, e.g.*, *Rebenok v. Noem*, No. 25-cv-2171-TWR at ECF No. 13; *Van Tran v. Noem*, 2025 WL 2770623 at *3; *Nguyen Tran v. Noem*, No. 25-cv-2391-BTM, ECF No. 6 (S.D. Cal. Sept. 18, 2025);

Louangmilith v. Noem, 2025 WL 2881578, No. 25-cv-2502-JES, *4 (S.D. Cal. Oct. 9, 2025). This Court should therefore grant the petition or a preliminary injunction on all three grounds.

ARGUMENT

I. This Court has jurisdiction to consider Mr. Phakeokoth's claims.

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

In *Ibarra-Perez*, the Ninth Circuit squarely held that § 1252(g) does not prohibit immigrants from asserting a "right to meaningful notice and an opportunity to present a fear-based claim before [they] [are] removed," *id.* at *7[1]—the same claim that Mr. Phakeokoth raises here with respect to third-country removals. The Court reasoned that "§ 1252(g) does not prohibit challenges to unlawful practices merely because they are in some fashion connected to removal orders." *Id.* Instead, § 1252(g) is "limited . . . to actions challenging the Attorney General's discretionary decisions to initiate proceedings, adjudicate cases, and execute removal orders." *Arce v. United States*, 899 F.3d 796, 800 (9th Cir. 2018). It does not apply to arguments that the government "entirely lacked the authority, and therefore the discretion," to carry out a particular action. *Id.* at 800. Thus, § 1252(g) applies to "discretionary decisions that [the Secretary] actually has the

[1] Mr. Ibarra-Perez raised this claim in a post-removal Federal Tort Claims Act ("FTCA") case, *id.* at *2, while this is a pre-removal habeas petition. But the analysis under § 1252(g) remains the same, because both Mr. Ibarra-Perez and Mr. Phakeokoth 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).

power to make, as compared to the violation of his mandatory duties." *Ibarra-Perez*, 2025 WL 2461663, at *9.

The same logic applies to all of Mr. Phakeokoth's claims, because he challenges only violations of ICE's mandatory duties under statutes, regulations, and the Constitution. Accordingly, "[t]hough 8 U.S.C § 1252(g), precludes this Court from exercising jurisdiction over the executive's decision to 'commence proceedings, adjudicate cases, or execute removal orders against any alien,' this Court has habeas jurisdiction over the issues raised here, namely the lawfulness of [Mr. Phakeokoth's] continued detention and the process required in relation to third country removal." *Y.T.D.*, 2025 WL 2675760, at *5.

Other courts agree. *See, e.g.*, *Kong*, 62 F.4th at 617 ("§ 1252(g) does not bar judicial review of Kong's challenge to the lawfulness of his detention," including ICE's "fail[ure] to abide by its own regulations"); *Cardoso v. Reno*, 216 F.3d 512, 516 (5th Cir. 2000) ("[S]ection 1252(g) does not bar courts from reviewing an alien detention order[.]"); *Parra v. Perryman*, 172 F.3d 954, 957 (7th Cir. 1999) (1252(g) did not apply to a "claim concern[ing] detention"); *J.R. v. Bostock*, No. 2:25-CV-01161-JNW, 2025 WL 1810210, at *3 (W.D. Wash. June 30, 2025) (1252(g) did not apply to claims that ICE was "failing to carry out non-discretionary statutory duties and provide due process"); *D.V.D. v. U.S. Dep't of Homeland Sec.*, 778 F. Supp. 3d 355, 377–78 (D. Mass. 2025) (§ 1252(g) did not bar review of "the purely legal question of whether the Constitution and relevant statutes require notice and an opportunity to be heard prior to removal of an alien to a third country").

In short, Mr. Phakeokoth does not challenge whether the government may "execute" his removal under 8 U.S.C § 1252(g)—only whether it may detain him up to the date it does so or remove him to a third country without notice and an opportunity to be heard. This Court thus has jurisdiction.

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II. Mr. Phakeokoth's claims succeed on the merits.

This Court need not speculate about whether Mr. Phakeokoth may succeed on the merits. Because the government's evidence is insufficient to justify Mr. Phakeokoth's detention, his petition should be granted outright, or the Court should at least release him on a TRO pending further briefing.

A. Claim One: ICE did not adhere to the regulations governing re-detention.

ICE's regulatory violations alone are sufficient to grant the habeas petition or TRO. First, ICE did not provide Mr. Phakeokoth sufficient notice under 8 C.F.R. § 241.13 of the reasons for the revocation of his release. The Notice of Revocation of Release simply states that this revocation was "based on a review of your official alien file and a determination that there are changed circumstances in your case." Dkt. 9-2, Exhibit 4. But "[s]imply to say that circumstances had changed or there was a significant likelihood of removal in the foreseeable future is not enough." *Sarail A. v. Bondi*, No. 25-CV-2144, 2025 WL 2533673, at *3 (D. Minn. Sept. 3, 2025). Rather, "Petitioner must be told *what* circumstances had changed or *why* there was now a significant likelihood of removal in order to meaningfully respond to the reasons and submit evidence in opposition, as allowed under § 241.13(i)(3)." *Id.* By "identif[ying] the category—'changed circumstances'—but fail[ing] to notify [Petitioner] of the reason—the circumstances that changed and created a significant likelihood of removal in the reasonably foreseeable future—[ICE] failed to follow the relevant regulation." *Id.*

The fact that ICE claims to have received a travel document for Mr. Phakeokoth does not negate this regulatory violation. As noted, other judges in this district have ordered petitioners released due to regulatory violations even *after* ICE obtained a travel document. *See, e.g., Truong v. Noem*, 25-cv-2597-JES-MMP, Dkt. 13 (S.D. Cal. Oct. 22, 2025) (granting habeas because "the Government failed to follow its own regulations" even though ICE had obtained

travel document); *Khambounheuang v. Noem*, 25-cv-2575-JO-SBC, Dkt. 17 (S.D. Cal. Oct. 23, 2025) (same); *Ngo v. Noem*, 25-cv-2739-TWR-MMP, Dkt. 11 (S.D. Cal. Oct. 23, 2025) (same); *Sphabmixay v. Noem*, 25-cv-2648-LL (S.D. Cal. Oct. 30, 2025) (same).

Importantly, the government admits that it did not obtain a travel document until *six weeks after* it re-detained Mr. Phakeokoth. Dkt. 9-1 at ¶¶ 6, 9. So even assuming that obtaining a travel document constitutes "changed circumstances," these "changed circumstances" did not exist on August 28, 2025, at the time ICE revoked Mr. Phakeokoth's supervision and re-detained him. Nowhere does the government explain how a later change in circumstances can legally "cure" a regulatory violation.

Moreover, the government's own evidence suggests that the possibility of removal remains speculative. The declaration of Deportation Officer Alexis Boada does not say that Mr. Phakeokoth *will* be removed shortly—only that he "has been *nominated* to be *scheduled* for removal." Dkt. 9-1 at ¶ 10 (emphasis added). Though DO Boada says that this is "anticipated" to occur within 30 days, she qualifies this by noting that it is "contingent upon flight availability and the completion of required notifications." Dkt. 9-1 at ¶ 10. Additionally, DO Boada states that this removal will occur via "commercial flight," which appears to be a different procedure than ICE has been using for other recent removals to Laos. Dkt. 9-1 at ¶ 10.

Lastly—but importantly—the government's return never mentions the fact that Mr. Phakeokoth suffers from schizophrenia. Dkt. 1, Exhibit A. Nor does it address the fact that Mr. Phakeokoth did not receive his medication for months, *see id.*, or provide any assurance that he has since received it. This not only casts doubt on the sufficiency of the notice Mr. Phakeokoth received under the Rehabilitation Act of 1973, *see* 29 U.S.C. § 794(a), it also calls into question the likelihood of his removal. Placing an unmedicated, mentally ill individual on a

commercial flight for over 20 hours carries a host of risks, and the government's silence on this subject suggests it has not considered or prepared for complications that may arise.

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

Second, the government provides insufficient assurances that Mr. Phakeokoth will likely be removed to Laos in the reasonably foreseeable future.

As an initial matter, DO Boada admits that Mr. Phakeokoth has been detained for more than six months since his removal order. Dkt. 9-1 at ¶ 5. Yet the government appears to contend that the six-month grace period starts over every time ICE re-detains someone. Dkt. 9 at 6–7. "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).

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. Phakeokoth need not rebut the "presumptively reasonable period of detention." Dkt. 9 at 6.

Because the six-month grace period has passed, this court moves on to the burden-shifting framework. The government does not deny that Mr. Phakeokoth has provided "good reason" to doubt his reasonably foreseeable removal, thereby forfeiting the issue. *See* Dkt. 9 at 7. *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").

For the reasons previously explained, the government has provided insufficient assurances of either. Being "*nominated* to be *scheduled* for removal" is at least two steps removed from being actually deported. Dkt. 9-1 at ¶ 10. Moreover, removal is "contingent upon flight availability and the completion of required notifications." Dkt. 9-1 at ¶ 10. And the government never explains how it will successfully place an unmedicated person who suffers from schizophrenia on a "commercial flight" that will likely last more than 20 hours. Dkt. 9-1 at ¶ 10. Thus, Mr. Phakeokoth therefore succeeds under *Zadvydas*, too.

C. Claim Three: The government does not deny that ICE's third-country removal policy violates due process, and this claim is justiciable.

This Court should also prohibit ICE from removing Mr. Phakeokoth to a third country without adequate notice. The government does not try to defend ICE's third-country removal policy on the merits. Instead, the government says that a third-country removal challenge is nonjusticiable under Article III because ICE professes no current plans to remove Mr. Phakeokoth to a third country. Dkt. 9 at 3–4.

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

This Court need not adopt that Kafkaesque view. The government has not denied that "the default procedural structure without an injunction" is "set forth in DHS's March 30 and July 9, 2025 policy memoranda," which provide for third-country removal with little or no notice. *Y.T.D. v. Andrews*, No. 1:25-CV-01100 JLT SKO, 2025 WL 2675760, at *5 (E.D. Cal. Sept. 18, 2025). And Mr. Phakeokoth has "point[ed] to numerous examples of cases involving individuals who DHS has attempted to remove to third countries with little or no notice or opportunity to be heard." *Id.*; *see* Dkt. 1 at 5–6. "On balance," then, "there is a sufficiently imminent risk that [Mr. Phakeokoth] will be subjected to improper process in relation to any third country removal to warrant imposition of an injunction requiring additional process." *Y.T.D.*, 2025 WL 2675760, at *11. And Judge Moskowitz recently issued a TRO prohibiting third-country removal, even though the government claimed there—as here—that ICE had no current plans to remove the petitioner to a third country. *Tran v. Noem*, 25-cv-02391-BTM, Dkt. No. 6.

III. The remaining TRO factors decidedly favor Mr. Phakeokoth.

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

On the irreparable harm prong, "[i]t is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). And contrary to the government's arguments,[2] the Ninth Circuit has specifically recognized the "irreparable harms

[2] The government cites several cases to support the position that illegal immigration detention is not irreparable harm. Dkt. 9 at 11, 12. 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,

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. Phakeokoth 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. Phakeokoth's immediate release, and (2) prohibit the government from removing Mr. Phakeokoth to a third country without following the process

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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.

laid out in *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).

Respectfully submitted,

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s/ Kara Hartzler

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