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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
PHOENIX DIVISION

Dong Van Nguyen,

Petitioner,

v.

Gregory J. Archambeault, *in his official capacity as Field Office Director, San Diego Field Office, U.S. Immigration and Customs Enforcement,*

David R. Rivas, *in his official capacity as Warden, San Luis Regional Detention Center,*

United States Department of Homeland Security,

United States Immigration and Customs Enforcement,

Respondents.

Case No.

PETITIONER'S MOTION AND MEMORANDUM OF LAW IN SUPPORT OF A TEMPORARY RESTRAINING ORDER

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I. MOTION FOR A TEMPORARY RESTRAINING ORDER

Petitioner, Dong Van Nguyen, ("Mr. Nguyen" or "Petitioner"), is a national of Vietnam who Respondents unlawfully re-detained on June 24, 2025. This Court should issue a temporary restraining order that requires Respondents to release Mr. Nguyen because "immediate and irreparable injury . . . or damage" is occurring and will continue in the absence of an order. Fed. R. Civ. P. 65(b). This Court should follow the prior decisions of the Court which have found that the re-detention of a non-citizen without prior notice and revocation of an order of supervision ("OSUP") is unlawful and warrants the individual's immediate release. *See* Exhibit C (October 28, 2025 Order, *Bui v. Archambeault et al*, 2:25-cv-03774-KML-JFM); Exhibit D (October 20, 2025 Order, *Ho v. Archambeault et al*, 2:25-cv-03753-JJT-JZB).

II. MEMORANDUM OF LAW IN SUPPORT OF MOTION

A. STATEMENT OF FACTS

1. Mr. Nguyen

On or around February 25, 1992, Mr. Nguyen lawfully entered the United States with his parents as a refugee. Exhibit A (**Declaration of Dong Van Nguyen**) ¶3. Mr. Nguyen's partner is a lawful permanent resident ("LPR"), and he has four children who are United States citizens ("USC"). *Id.* ¶1-2. Mr. Nguyen's father is also a United States citizen. *Id.*¶2. Mr. Nguyen has complied with the terms and conditions of the most recent Order of Supervision ("OSUP") issued in 2023. *Id.* ¶¶14-16. On June 24, 2025, ICE re-detained Mr. Nguyen without prior notice during his at a meeting he had with his probation officer. *Id.* ¶17. Prior to his re-detention, ICE did not revoke his OSUP. *Id.*

Though ordered removed in 1999, the government does not have the travel documents necessary to return Mr. Nguyen to Vietnam, and such circumstances are unlikely to change. *Id.* ¶¶20-29; Exhibit B (Declaration of Tin Nguyen, Esq.) ¶¶ 17-19; Exhibit E (Memorandum of Understanding with Vietnam). ICE has threatened Vietnamese nationals detained at the San Luis

Regional Detention Center, like Mr. Nguyen, with removal to third countries such as Eswatini. Exhibit A ¶¶ 25-26.

2. Repatriation to Vietnam History

Before a Vietnamese immigrant without a passport or other travel document can be repatriated, Vietnam must issue a passport or other travel document in response to a request from ICE. *See Trinh v. Homan*, 466 F. Supp. 3d 1077, 1083 (C.D. Cal. 2020). Between the end of the Vietnam War and 2008, Vietnam refused to repatriate any Vietnamese immigrant who had been ordered removed from the U.S. *See id.* In 2008, Vietnam agreed to consider repatriation requests for Vietnamese immigrants who had arrived in the U.S. after July 12, 1995, but not those who arrived before. *See id.* Between 2017 and 2019, ICE requested travel documents for pre-1995 Vietnamese immigrants 251 times; Vietnam granted those requests only 18 times. *Id.* at 1087-88.

3. Pre-1995 Repatriation to Vietnam Is Not Reasonably Foreseeable

There are no known changes to Vietnam's acceptance rate of pre-1995 deportees, which upon information and belief, is very low. *See* Exhibit B ¶10-12, 16-19. The process to secure a travel document from Vietnam for a pre-1995 immigrant is multilayered and lengthy, requiring interviews and verification by authorities in Vietnam. *Id.* ¶¶10-12.

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), pending appeal, that required ICE to follow the 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). Following those decisions, on July 9, 2025, ICE issued a new memo to staff, instructing that ICE may deport a person to a third country not designated on the removal order, without any procedures for notice or an opportunity to be heard,

if the State Department confirms that it has received diplomatic assurances that removed individuals will not be persecuted or tortured.

If no diplomatic assurances are received, the memo instructs officers to serve on the non-citizen a Notice of Removal that includes the intended country of removal. It tells officers not to ask whether the individual is afraid of removal to that country, and states that officers should "generally wait at least 24 hours following service of the Notice of Removal before effectuating removal." *Id.* Further, "[i]n exigent circumstances, [ICE] may execute a removal order six (6) or more hours after service of the Notice of Removal as long as the [non-citizen] is provided reasonable means and opportunity to speak with an attorney prior to removal." *Id.*

The memo instructs that if the non-citizen "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." If the non-citizen "does affirmatively state a fear if removed to the country of removal," then ICE will refer the case to U.S. Citizenship and Immigration Services ("USCIS") for a screening of eligibility for withholding of removal and protection under the Convention Against Torture. "USCIS will generally screen within 24 hours." If USCIS determines that the [non-citizen] does not meet the standard, the individual will be removed. *Id.* If USCIS determines that they have 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 [Convention Against Torture ('CAT')] or designate another country for removal."

4. Punitive Removal to Third Countries

Since January 2025, Respondents have developed and implemented a policy and practice of removing individuals to third countries, without first following the Immigration and

Nationality Act ("INA") procedures for designation and removal to a third county, and without providing fair notice and an opportunity to contest their removal in immigration court. These removals are unconstitutionally punitive, crossing the line from the civil sanction of deportation to blatant punitive banishment.[1] The Administration has negotiated with countries to have U.S. deportees detained in prisons, camps or other facilities. Deportees sent to third countries have, in fact, been incarcerated. 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.[2] In Panama, officials confiscated cell phones, and did not allow the detainees access to their attorneys.[3] Deportees slept in structures made from plastic sheets and had to be escorted to the toilet.[4] They were "guarded like prisoners."[5]

On July 4, 2025, ICE deported eight men, including one pre-1995 Vietnamese refugee, to South Sudan.[6] The government of South Sudan said in a statement that the deportees were, "under the care of the relevant authorities," but their families and legal teams have been unable to contact

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[1] Roll Call, *Donald Trump Vlog Self-Deportation Program - May 9, 2025*, at 00:00:55 (emphasis added), https://rollcall.com/factbase/trump/transcript/donald-trump-vlog-self-deportation-program-may-9-2025/ (last visited July 24, 2025).

[2] The Associated Press, *Migrants Expelled from U.S. to Costa Rica, Panama in a Legal 'Black Hole,'* CBC News (Feb. 28, 2025, 6:29 AM), https://www.cbc.ca/news/world/costa-rica-panama-us-migrants-1.7471142; Juan Zamorano, *Nearly 300 Deportees from US held in Panama Hotel as Officials Try to Return Them to Their Countries*, AP World News (Feb. 18, 2025), https://apnews.com/article/panama-trump-migrants-darien-d841c33a215c172b8f99d0aeb43b0455; Manuel Rueda, *Asylum Seekers Deported by the U.S. Are Stuck in Panama and Unable to Return Home*, All Things Considered, NPR (May 5, 2025), https://www.npr.org/2025/05/05/nx-s1-5369572/asylum-seekers-deported-by-the-u-s-are-stuck-in-panama-unable-to-return-home.

[3] Julie Turkewitz et al, *Migrants, Deported to Panama Under Trump Plan, Detained in Remote Jungle Camp*, N.Y. Times (Feb. 19, 2025), https://www.nytimes.com/2025/02/19/world/americas/us-migrants-panama-jungle-camp.html?login=smartlock&auth=login-smartlock.

[4] Matias Delacroix & Megan Janetsky, *Isolated in 'Harsh Conditions:' Deportee from US Details Legal Limbo in Panama Camp Near Darien Gap*, AP World News (Feb. 22, 2025), https://apnews.com/article/panama-deportees-trump-hotel-darien-gap-iom-bba8c3dc33fd38efd569a5b51e481a86.

[5] *Id.*

[6] Guardian, *US Judge Clears Path for Eight Immigrants to be Deported to South Sudan*, July 4, 2025, https://www.theguardian.com/us-news/2025/jul/04/south-sudan-deportations-halted.

them, and have not heard from the men since the deportation was completed.[7] DHS spokesperson, Tricia McLaughlin, referred to the men as "depraved monsters," and "so uniquely barbaric that their home countries refused to take them back."[8] Thabile Mdluli, spokesperson for the government of Eswatini, announced that the men are being held in solitary confinement in its prisons.[9]

The Administration has selected countries known for human rights abuses. For example, Eswatini is ruled by a monarch with complete power, and many of its citizens live on less than four dollars a day.[10] The prison system is overcrowded, with prisoners receiving one meal a day.[11] The U.S. Department of State advises Americans to "exercise increased caution in Eswatini due to crime and civil unrest."[12]

III. LEGAL STANDARD

To obtain a Temporary Restraining Order, movant "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839-40 & n.7 (9th Cir. 2001) (noting that a TRO and preliminary injunction involve "substantially identical" analysis). Courts also employ "an alternative 'serious

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[7] Mattathias Schwartz, *Trump Administration Poised to Ramp Up Deportations to Distant Countries*, N.Y. Times (July 13, 2025), https://www.nytimes.com/2025/07/13/us/politics/south-sudan-third-country-deportations.html.

[8] Tricia McLaughlin (@TriciaOhio), X (July 15, 2025), https://x.com/TriciaOhio/status/1945274627976200206.

[9] Nimi Princewill et al., *'Not Trump's Dumping Ground': Outrage Over Arrival of Foreign US Deportees in Tiny African Nation*, CNN World (July 18, 2025), https://www.cnn.com/2025/07/17/africa/africa-eswatini-trump-us-deportees-intl.

[10] Nimi Princewill et al., *'Not Trump's Dumping Ground': Outrage Over Arrival of Foreign US Deportees in Tiny African Nation*, CNN World (July 18, 2025), https://www.cnn.com/2025/07/17/africa/africa-eswatini-trump-us-deportees-intl.

[11] *Id.*

[12] U.S. Department of State, Travel.State.Gov, *Eswatini Travel Advisory* (July 1, 2024), https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/eswatini-travel-advisory.html.

question' standard, also known as the 'sliding scale' variant of the *Winter* standard." *Fraihat v. U.S. Immigr. & Customs Enf't*, 16 F.4th 613, 635 (9th Cir. 2021) (citation omitted). Under this approach, the four *Winter* elements are "balanced, so that a stronger showing of one element may offset a weaker showing of another." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). A TRO may be granted where there are "'serious questions going to the merits' and a hardship balance. . . tips sharply toward the plaintiff," and so long as the other *Winter* factors are met. *Id.* at 1132.

IV. ARGUMENT

A. Mr. Nguyen Is Likely to Succeed on the Merits of His Claims

1. Mr. Nguyen's Re-Detention Is Unconstitutional and Unlawful

Mr. Nguyen is likely to succeed on the merits of his claim that his re-detention violates the Due Process Clause, 8 U.S.C. § 1231(a), and governing regulations. The INA provides that after a removal order becomes final, the government "shall remove the alien from the [U.S.] within a period of 90 days." 8 U.S.C. § 1231(a)(1)(A). This 90-day period is often referred to as the initial removal period, and during it, the government "shall detain the alien." *Id.* § 1231(a)(2). In some circumstances, federal immigration authorities can continue to detain a non-citizen beyond the initial removal period. Specifically, section 1231(a)(6) allows the government to detain certain enumerated classes of immigrants—including those ordered removed due to criminal convictions—for more than 90 days. *Id.* § 1231(a)(6).

The Supreme Court in *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001), rejected the government's position that section 1231(a)(6) permitted indefinite detention following the initial removal period. It held that "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem" because it would become punitive. *Id.* at 690. "[G]overnment detention violates [the Fifth Amendment's Due Process Clause] unless the detention is ordered in a *criminal* proceeding with adequate procedural protections." *Id.* The Court held that section 1231(a)(6) "implicitly limits an alien's detention to a period reasonably necessary to bring about

that alien's removal." *Id.* at 679. Thus, "once removal is no longer reasonably foreseeable, continued detention is no longer authorized by [section 1231(a)(6)]." *Id.* at 699. "[F]or the sake of uniform administration in the federal courts," the Court found that post-removal detention was "presumptively reasonable" for the first six months. *Id.* at 700–01.

After that "presumptively reasonable" six-month period ends, once the non-citizen "provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing. And for detention to remain reasonable, as the period of prior postremoval confinement grows, what counts as the 'reasonably foreseeable future' conversely would have to shrink." *Id.* at 701.

Upon release from custody, a non-citizen subject to a final order of removal must comply with certain conditions of release. 8 U.S.C. §§ 1231(a)(3), (6). The regulations at 8 C.F.R. § 241.4(l)(1)-(2) and 8 C.F.R. § 241.13(i) set forth the process for revoking orders of supervision. For instance, a designated official may revoke a non-citizen's release and return them to ICE custody due to failure to comply with any of the conditions of release, 8 C.F.R. § 241.13(i)(1), or if, "on account of changed circumstances, the Service determines that there is a significant likelihood that the [non-citizen] may be removed in the reasonably foreseeable future." *Id.* § 241.13(i)(2).

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

revocation and further denial of release." *Id.* § 241.13(i)(3).

ICE's decision to re-detain Mr. Nguyen is governed by the factors laid out in 8 C.F.R. § 241.13(f), including "the history of the [non-citizen's] efforts to comply with the order of removal, the history of [ICE's] efforts to remove [non-citizens] to the country in question or to third countries, including the ongoing nature of [ICE's] efforts to remove [the non-citizen] and the [non-citizen's] assistance with those efforts, the reasonably foreseeable results of those efforts, and the views of the Department of State regarding the prospects for removal of [non-citizens] to the country or countries in question." *See also Phan v. Beccerra*, No. 2:25-CV-01757, 2025 WL 1993735, at *3 (E.D. Cal. July 16, 2025). A court may not make this determination in the first instance, but may review it for compliance with the regulation. *See id.*; *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)).

Here, there is no lawful justification for Mr. Nguyen's re-detention and continued detention. ICE did not revoke Mr. Nguyen's OSUP prior to detaining him. Exhibit A ¶¶ 15-17. Mr. Nguyen's removal to Vietnam is not reasonably foreseeable, as Respondents have not requested that Mr. Nguyen sign any documents, nor received any response to their request for a travel document from Vietnam. *Id.* ¶21-23; Exhibit B ¶ 16-19. Respondents had not requested a travel document from Vietnam before re-detaining Mr. Nguyen on June 24, 2025. *Id.* ¶¶ 17-19. "Respondents' intent to complete a travel document request for Petitioner does not make it significantly likely he will be removed in the foreseeable future" or constitute a changed circumstance. *Phan*, 2025 WL 1993735, *5; *see Liu v. Carter*, No. 25-cv-03036-JWL, 2025 WL 1696526, at *2 (D. Kan. June 17, 2025).

As Mr. Nguyen is a pre-1995 Vietnamese immigrant, there is no evidence that Vietnam is likely to issue a travel document. *See* Exhibit B ¶¶10-12. Indeed, as several courts have recently pointed out, there is no evidence that Vietnam is accepting any pre-1995 deportees at greater rates that would make removal significantly likely in the reasonably foreseeable future. *See, e.g., Hoac*

v. Becerra, No. 25-cv-01740-DC-JDP, 2025 WL 1993771, at *5 (E.D. Cal. July 16, 2025) (adopting the court's analysis in *Nguyen v. Hyde*, 2025 WL 1725791, at *4, and concluding there was "no evidence regarding the percentage of successful requests to Vietnam to demonstrate changed circumstances"); *Phan*, 2025 WL 1993735, at *4 (same). The mere existence of the 2020 MOU is "not enough to show that a changed circumstance had occurred." *Hoac*, 2025 WL 1993771, at *4; *see Nguyen*, 2025 WL 1725791, at *4 (same).

The government's acceptance of the terms and conditions of Mr. Nguyen's release, make Respondents re-detention of him now, without following the process to revoke his OSUP, and without a likely prospect of removal to Vietnam, unconstitutional. *See Zadvydas*, 533 U.S. at 701 ("as the period of prior postremoval confinement grows, what counts as the 'reasonably foreseeable future' conversely would have to shrink"). Moreover, over twenty-five years have passed since Mr. Nguyen was first ordered removed, diminishing the government's prospect of removal even further. *See, e.g., Tadros v. Noem*, No. 25-cv-4108-EP, 2025 WL 1678501, at *3 (D.N.J. June 13, 2025) ("Tadros has demonstrated there is no significant likelihood of his removal in the reasonably foreseeable future because fifteen years have gone by without the Government securing. . . his removal."). *See also* Exhibit A ¶ 8.

Respondents did not comply with the procedural requirements of 8 C.F.R. § 241.13(i) and §§ 241.4(l)(1)(-(2) in revoking Mr. Nguyen's order of supervised release. 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."). "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required." *Morton v. Ruiz*, 415 U.S. 199, 235 (1974).

There are no "changed circumstances" which make it significantly likely that Mr. Nguyen will be removed in the foreseeable future. 8 C.F.R. § 241.13(i)(2). ICE did not notify Mr. Nguyen

of the "reasons for revocation of his [] release," conduct "an initial informal interview promptly after his . . . return to [ICE] custody to afford [him] an opportunity to respond to the reasons for revocation stated in the notification," allow him to "submit any evidence or information that he or she believes shows there is no significant likelihood he or she [will] be removed in the reasonably foreseeable future," or provide him with a written "revocation custody review." *Id.* § 241.13(i)(3); *see also Phan*, 2025 WL 1993735, at *3. Moreover, ICE did not consider the factors in § 241.13(f) that govern their decision to re-detain. Accordingly, Mr. Nguyen is likely to succeed on his claim that his re-detention was unlawful. *See* Exhibits C & D.

2. Mr. Nguyen Is Entitled to Legally Required Procedures Prior to Any Nonpunitive Third Country Removal

Mr. Nguyen is likely to succeed on the merits of his claim that he may not be removed to a third country, absent Respondents following the legally required, multistep procedures set out in 8 U.S.C. § 1231(b) and required by due process under the Fifth Amendment of the U.S. Constitution. No country other than Vietnam meets the criteria for removal under 8 U.S.C. § 1231(b)(2)(A)-(E). Moreover, to remove Mr. Nguyen to a third country, the statute requires that the Attorney General—here, an immigration judge—first determine that it is "impracticable, inadvisable, or impossible" to remove Mr. Nguyen to Vietnam, and that the designated third country "will accept [Mr. Nguyen] into that country." *Id.* § 1231(b)(2)(E)(vii); *see Himri v. Ashcroft*, 378 F.3d 932, 939 n. 4 (9th Cir. 2004) (8 U.S.C. § 1231(b)(E)(vii) ("indisputably requires the Attorney General to prove that the proposed country of removal is willing to accept the alien"); *see also Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 344 (2005). It is the immigration judge, not DHS, that the statute authorizes to designate a third country for removal. 8 U.S.C. § 1231(b)(2)(E)(vii) ("the Attorney General shall remove the alien to. . ."); *see also* 8 C.F.R. § 1240.10(f) (in removal proceedings the immigration judge "shall. . . identify for the record a country, or countries in the alternative, to which the alien's removal may be made"). Here, Respondents would first need to move to reopen the removal proceedings, and to then

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

Adherence to that process also ensures Mr. Nguyen's statutory right to claim protection in immigration court, against removal to a third country where he may be persecuted or tortured, a form of protection known as withholding of removal. 8 U.S.C. § 1231(b)(3)(A); *see also* 8 C.F.R. §§ 208.16, 1208.16. The process further ensures Mr. Nguyen maintains his right to claim deferral of removal under the Convention Against Torture ("CAT"). *See* 28 C.F.R. § 200.1 ("A removal order. . . shall not be executed in circumstances that would violate [the CAT]"); 8 C.F.R. §§ 208.17-18, 1208.17-1208.18.

Notice cannot be "last minute," because that would deprive an individual of a meaningful opportunity to apply for fear-based protection from removal. *Andriasian v. INS*, 180 F.3d 1033, 1041 (9th Cir. 1999). Non-citizens must have time to prepare and present relevant arguments and evidence, and to seek reopening of their removal case. "[W]ritten notice of the country being designated" is required, and "the statutory basis for the designation, i.e., the applicable subsection of § 1231(b)(2)" must be specified. *Aden*, 409 F. Supp. 3d at 1019; *see also D.V.D. v. U.S. Dep't of Homeland Sec.*, No. 25-cv-10676-BEM, 2025 WL 1453640, at *1 (D. Mass. May 21, 2025) ("All removals to third countries, *i.e.*, removal to a country other than the country or countries designated during immigration proceedings as the country of removal on the non-citizen's order of removal, must be preceded by written notice to both the non-citizen and the non-citizen's counsel in a language the non-citizen can understand." (internal

citation omitted)); *Andriasian*, 180 F.3d at 1041 (due process requires notice to the non-citizen of the right to apply for asylum and withholding to the country where they will be removed).

Due process also demands that the government "ask the non-citizen whether he or she fears persecution or harm upon removal to the designated country and memorialize in writing the non-citizen's response. This requirement ensures DHS will obtain the necessary information from the non-citizen to comply with § 1231(b)(3) and avoids [a dispute about what the officer and non-citizen said]." *Aden*, 409 F. Supp. 3d at 1019.

Respondents' third country removal program circumvents these statutory and constitutional procedural protections afforded to non-citizens. According to ICE's July 9th guidance, individuals can be removed to third countries "without the need for further procedures," so long as "the [U.S.] has received diplomatic assurances." Mr. Nguyen is likely to succeed on the merits of his claim, on this fact alone, because the policy directs officers to violate their statutory and constitutional obligations. The same is true of the minimal procedures ICE offers when no diplomatic assurances are present. The policy provides no meaningful notice (6-24 hours), instructs officers *not* to ask about fear, and provides no actual opportunity to see counsel and prepare a fear-based claim (6-24 hours), let alone reopen removal proceedings. In sum, the guidance instructs ICE officers to violate the rights of non-citizens whom they seek to subject to their unlawful third country removal program.

Several courts have recently granted individual TROs against removal to third countries under similar circumstances. *See generally See Van Tran v. Noem*, 25-cv-2334-JES-MSB, 2025 U.S. Dist. LEXIS 191834, 7-8 (S.D. Cal. September 29, 2025) (ordering release after examining nearly identical facts); *J.R. v. Bostock*, 25-cv-01161-JNW, 2025 WL 1810210 (W.D. Wash. Jun. 30, 2025) (immediately enjoining removal to "Cuba, Libya, or any third country in the world absent prior approval from this Court"); *Phan*, 2025 WL 1993735, at *7 (enjoining Respondents from "re-detaining or removing Petitioner to a third country without notice and an opportunity to be heard"); *Hoac*, 2025 WL 1993771, at *7 (same); *Vaskanyan v. Janecka*, 25-cv-01475-

MRA-AS, 2025 WL 2014208 (C.D. Cal. Jun. 25, 2025); *Ortega v. Kaiser*, 25-cv-05259-JST, 2025 WL 1771438 (N.D. Cal. June 26, 2025).

3. The Constitution Prohibits Third Country Removals Without Due Process

Mr. Nguyen is likely to succeed on the merits of his claim that the Constitution prohibits him from being subjected to Respondents' punitive third country removal program. The prohibition against imposing punitive measures on a non-citizen subject to a final order of removal is as old as immigration law. *Wong Wing v. United States*, 163 U.S. 228 (1896). In *Wong Wing*, the Supreme Court struck down a provision of the Chinese Exclusion Act that imposed one year of imprisonment at hard labor as an immigration sanction before their deportation. *Id.* at 237. The Court drew a distinction between "deportation," which it described as a sanction for failure to comply with the legal requirements of residency in the U.S. that may be imposed by executive authorities, and "punishment," which may not. *Id.* at 236-37. The Court held that the government could not attach a punishment to deportation—here, imprisonment—without criminal charges, a judicial trial, and the concomitant protections of the Fifth, Sixth and Eighth Amendments. *Id.*

The government's third country removal program defies 130 years of constitutional immigration law distinguishing between civil penalty and infamous punishment. *See, e.g., Zadvydas*, 533 U.S. at 694. To determine whether a given sanction constitutes punishment, courts look to intent. If the government's intent is to punish, "that is the end of the inquiry." *Am. Civ. Liberties Union of Nevada v. Masto*, 670 F.3d 1046, 1053 (9th Cir. 2012) (citing *Smith v. Doe*, 538 U.S. 84, 92 (2003)). As shown above, the government's own statements show intent to deport individuals, particularly those with criminal convictions, into situations of forever confinement and substantial harm.

When the government's intent to punish is unclear, courts move to the second step of the inquiry, and determine whether the practices are "so punitive either in purpose or effect as to negate the [government's] intention to deem it civil." *Id.* (quoting *Smith*, 538 U.S. at 92). To

determine punitive purpose or effect, courts often turn to the factors laid out in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). *See also Hudson v. United States*, 522 U.S. 93, 99 (1997) ("the factors listed in *Kennedy v. Mendoza-Martinez* [citation], provide useful guideposts"). Those factors are: "[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned." *Mendoza-Martinez*, 372 U.S. at 168-69 (footnotes omitted).

Under these factors, the government's third country removal program undeniably constitutes punishment, as each factor is met. Under the first factor, the government's practice of deporting non-citizens, only to have them imprisoned or subjected to other forms of physical harm, is an "affirmative disability or restraint." The "paradigmatic affirmative disability" is the "punishment of imprisonment." *Smith*, 538 U.S. at 100. Moreover, under this factor, "we inquire how the effects of the [sanction] are felt by those subject to it. If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Id.* at 99-100. There can be no question that being deported to a country, to be imprisoned or experience other extreme harm, will be felt as a significant and direct disability or restraint.

The second factor is also satisfied. "[D]evices of banishment and exile have throughout history been used as punishment." *Mendoza-Martinez*, 372 U.S. at 168 n.23. In 1791, the year the Bill of Rights was ratified, deportation was *exclusively* used and understood as punishment. *Fong Yue Ting v. U.S.*, 149 U.S. 698, 740-41 (1893) (Brewer, J. dissenting) (citing President James Madison); *see id.* at 740 ("[I]t needs no citation of authorities to support the proposition that deportation is punishment. Everyone knows that to be forcibly taken away from home, family, friends, business, and property, and sent across the ocean to a distant land, is

punishment, and that oftentimes most severe and cruel."). Banishment as a form of punishment dates to ancient times, and was used on citizens and non-citizens alike. Peter L. Markowitz, *Deportation is Different*, 13 U. Pa. J. Const. L. 1299, 1308-09 (2011) (tracing the use of banishment from medieval England through colonial America).

The fourth factor, whether it promotes the traditional aims of punishment—retribution and deterrence—is also satisfied. The government's own statements make clear that its goals are retribution and deterrence, and through fear, threaten immigrants to leave the country on their own. As DHS Secretary Kristi Noem stated, "President Trump and I have a clear message to criminal illegal aliens: LEAVE NOW. If you do not leave, we will hunt you down, arrest you, and you could end up in this El Salvadorian prison."[13] The Supreme Court has made clear that such "general deterrence" justifications are impermissible absent criminal process. *See Kansas v. Crane*, 534 U.S. 407, 412 (2002) (warning that civil detention may not "become a 'mechanism for retribution or *general deterrence*'—functions properly those of criminal law, not civil commitment" (quoting *Kansas v. Hendricks*, 521 U.S. 346, 373 (1997) (Kennedy, J., concurring) (emphasis added)); *see Hendricks*, 521 U.S. at 373 (Kennedy, J. concurring) ("[W]hile incapacitation is a goal common to both the criminal and civil systems of confinement, retribution and general deterrence are reserved for the criminal system alone.").

The program also satisfies the third, fifth, sixth and seventh factors, because Respondents have designed the program specifically for non-citizens being deported for criminal convictions, there is no logical, nonpunitive rationale for deporting such non-citizens into dangerous conditions of imprisonment or other harm, and the program is designed to be patently excessive in relation to intended goal of simply removing non-citizens, deemed a flight risk or threat to the community, from the country.

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[13] Secretary Kristi Noem (@sec_noem), Instagram (Mar. 27, 2025), https://www.instagram.com/p/DHtVvbgsHhh/

B. Petitioner Will Suffer Irreparable Harm Absent Injunctive Relief

"It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Where the "alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Warsoldier v. Woodford*, 418 F.3d 989, 1001-02 (9th Cir. 2005) (quoting 11A Charles Alan Wright et al., *Federal Practice and Procedure*, § 2948.1 (2d ed. 2004)). "Unlawful detention certainly constitutes 'extreme or very serious damage, and that damage is not compensable in damages." *Hernandez v. Sessions*, 872 F.3d 976, 999 (9th Cir. 2017).

Here, the irreparable harm to Mr. Nguyen and his family is severe. *See* Exhibit A. He has already been unreasonably deprived of his liberty without due process and placed in detention in violation of law. *Id.* ¶17-29. Absent relief, Mr. Nguyen will remain in detention and separated from his family. *See id.* ¶1-2.

C. The Balance of Hardships and Public Interest Weigh Heavily in Petitioner's Favor

The final two factors for a preliminary injunction—the balance of hardships and public interest—"merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). "[T]he balance of hardships tips decidedly in plaintiffs' favor" when "[f]aced with such a conflict between financial concerns and preventable human suffering." *Hernandez*, 872 F.3d at 996 (quoting *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983)). Here, the balance of hardships heavily weighs Mr. Nguyen's favor. Mr. Nguyen faces weighty hardships: deprivation of his liberty, and removal to a third country where he is likely to suffer imprisonment or other serious harm. "[T]he [government] cannot reasonably assert that it is harmed in any legally cognizable sense by being enjoined from constitutional violations." *Zepeda v. I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1983). Moreover, it is always in the public interest to prevent violations of the U.S. Constitution and ensure the rule of law. *See Nken*, 556 U.S. at 436 (describing public interest in preventing non-citizens "from being wrongfully removed,

particularly to countries where they are likely to face substantial harm"); *Moreno Galvez v. Cuccinelli*, 387 F. Supp. 3d 1208, 1218 (W.D. Wash. 2019) (when government's treatment "is inconsistent with federal law, . . . the balance of hardships and public interest factors weigh in favor of a preliminary injunction."). Accordingly, the balance of hardships and the public interest overwhelmingly favor emergency relief to ensure Mr. Nguyen's freedom and prevent unlawful third country removal.

V. CONCLUSION

For the foregoing reasons, the Court should grant Petitioner's motion for temporary restraining order and order his immediate release from detention.

November 4, 2025

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Jesse M. Bless, hereby certify that on November 4, 2025, I served the above and foregoing, by causing a true and accurate copy of such papers to be filed and served on all counsel of record via the Court's CM/ECF electronic filing system.

/s/ Jesse M. Bless
Jesse M. Bless