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

12 PHUONG VAN PHAN,
13
14 Petitioner,

Civil Case No.: 25-cv-2997-JES-KSC

15 v.

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

16 KRISTI NOEM, Secretary of the
17 Department of Homeland Security,
18 PAMELA JO BONDI, Attorney General,
19 TODD M. LYONS, Acting Director,
20 Immigration and Customs Enforcement,
21 JESUS ROCHA, Acting Field Office
22 Director, San Diego Field Office,
23 CHRISTOPHER LAROSE, Warden at
24 Otay Mesa Detention Center,
25
26 Respondents.
27
28

1 INTRODUCTION

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

5 First, this Court must grant the petition on Claim 1 because the government
6 does not claim to have complied with 8 C.F.R. §§ 241.4, 241.13. For persons like
7 Mr. Phan, those regulations permit re-detention only if ICE (1) “determines that
8 there is a significant likelihood that the alien may be removed in the reasonably
9 foreseeable future,” *id.* § 241.13(i)(2), (2) makes that finding “on account of
10 changed circumstances,” *id.*, (3) provides “an initial informal interview
11 promptly,” *id.* §§ 241.4(D)(1), 241.13(i)(3), and (4) “affords the [person] an
12 opportunity to respond to the reasons for revocation,” *id.* The government
13 provides no evidence that ICE took any of those steps in the course of re-
14 detaining Mr. Phan.

15 Second, this Court must grant the petition on Count 2 because the
16 government provides no evidence to satisfy the success element (“a significant
17 likelihood of removal”) or timing element (“in the reasonably foreseeable future”) of
18 *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). Though Deportation Officer
19 (“DO”) Cole asserts that “ICE routinely obtains travel documents for Vietnamese
20 citizens, including those who entered the United States before 1995,” Doc. 7-1 at
21 ¶ 14, he does not say (1) what proportion of Vietnamese citizens for whom travel
22 documents are sought actually receive them, or (2) whether Mr. Phan qualifies for
23 removal at all under the 2020 Memorandum of Understanding (“MOU”). (The
24 government does not dispute that he may not be removed under the 2008 treaty.)
25 Nor does DO Cole give any indication of how long it takes to get travel
26 documents for pre-1995 Vietnamese citizens—no statistics, no estimations, no
27 anecdotes, no nothing. The government instead relies on ICE’s mere plans to seek
28 travel documents.

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

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

15 **ARGUMENT**

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

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

22 **A. Count 1: ICE did not adhere to the regulations governing re-**
23 **detention.**

24 First, the government provides no evidence that ICE complied with 8
25 C.F.R. §§ 241.4, 241.13. The government does not deny that these regulations
26 apply to Mr. Phan, that Mr. Phan may challenge them in this habeas case, or that
27 failure to comply with them is grounds for release. *See* Doc. 7 at 11–12. To the
28 contrary, the government appears to agree that Mr. Phan’s release was revoked

1 under 8 C.F.R. § 241.4(l)(2)(iii) and 8 C.F.R. § 241.13(i)(2). Doc. 7 at 12. But the
2 government implies that ICE complied with these regulations. *Id.* ICE did not.

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

11 In *Rokhfirooz*, Judge Huie determined the fourth requirement was not met
12 on a record materially indistinguishable from this one. 2025 WL 2646165, at *3
13 (S.D. Cal. Sept. 15, 2025). There, the government failed to produce “any
14 documented determination, made prior to Petitioner's arrest, that his release
15 should be revoked.” *Id.* at *3. The only documentation was “an arrest warrant,
16 issued on DHS Form I-200, merely recit[ing] that there is probable cause to
17 believe that Petitioner is ‘removable from the United States,’ that is, subject to
18 removal, which would be accurate whether or not Petitioner's release was
19 revoked.” *Id.*

20 That is the same documentation the government has produced here: The
21 government provides no documented, pre-arrest determination that release should
22 be revoked; it only includes an order of removal. Doc. 7-2, Order of Immigration
23 Judge. The I-213 confirms that his arrest was premised entirely on his status as a
24 removable immigrant, not a determination that release should be revoked due to
25 changed circumstances making removal significantly likely. Doc. 7-2, I-213.

26 Judge Huie also remarked in *Rokhfirooz* that the government had produced
27 “no record constitut[ing] a determination even after Petitioner's arrest that there is
28 a significant likelihood that Petitioner can be removed in the reasonably

1 foreseeable future.” 2025 WL 2646165, at *3. “In connection with defending
2 [that] lawsuit, Respondents prepared and filed a declaration from a Supervisory
3 Detention and Deportation Officer assigned to the detention center where
4 Petitioner is housed,” which stated that “[ICE Enforcement and Removal
5 Operations] determined that there is a significant likelihood of removal and
6 resettlement in a third country in the reasonably foreseeable future and re-detained
7 Petitioner to execute his warrant of removal.” *Id.* Judge Huie deemed that post-
8 hoc determination insufficient, because the declarant did not produce underlying
9 documentation showing that any such determination had actually been made—let
10 alone that it had been made pre-arrest. *Id.* The Court therefore “decline[d] to rely
11 on” those statements. *Id.*

12 Here, the evidence is even weaker. The Cole Declaration states that ICE
13 previously tried to remove Mr. Phan but that “ICE was unable to obtain a travel
14 document from Vietnam.” Doc. 7-1. Other than blank assertions, DO Cole does
15 not explain or provide any evidence showing what has changed since then that
16 would somehow make a travel document “available.” There is therefore “no
17 evidence that DHS has made such a determination as to the revocation of
18 Petitioner's release even after the fact of arrest, up to the present day.” *Rokhfirooz*,
19 2025 WL 2646165, at *4.

20 Additionally, even if ICE *had* revoked release because of a significant
21 likelihood of removal, that is not enough. The regulation requires that the
22 likelihood of removal arise out of “changed circumstances.” 8 C.F.R.
23 § 241.13(i)(2). Here, the same treaty and memorandum have applied to Mr.
24 Phan’s removal for 11 years. DO Cole identifies no changed circumstances, nor
25 does he assert that ICE premised re-detention on any such changes. And
26 “Respondents have not provided any details about why a travel document could
27 not be obtained in the past, nor have they attempted to show why obtaining a
28 travel document is more likely this time around.” *Hoac v. Becerra*, No. 2:25-CV-

1 01740-DC-JDP, 2025 WL 1993771, at *4 (E.D. Cal. July 16, 2025). Respondents
2 have announced only their “intent to eventually complete a travel document
3 request for Petitioner,” which “does not constitute a changed circumstance.” *Id.*

4 Finally, all of the above goes only to ICE’s violations of 8 C.F.R.
5 § 241.13(i)(2). Sections 241.4(l) and 241.13(i)(3) mandate additional procedures:
6 “[B]oth require ICE to provide ‘an initial informal interview promptly ... to afford
7 the alien an opportunity to respond to the reasons for revocation.’” *Rombot v.*
8 *Souza*, 296 F. Supp. 3d 383, 387 (D. Mass. 2017) (quoting 8 C.F.R.
9 §§ 241.4(l)(2), 241.13(i)(3)). But the regulations require that a person be
10 “afforded an initial informal interview *promptly* after his or her return to Service
11 custody.” 8 C.F.R. §§ 241.4(l)(1) (emphasis added). Here, the government did not
12 provide Mr. Phan an interview until November 10, 2025—over two months after
13 he was detained. Doc. 7-1, Cole Declaration. In *M.S.L. v. Bostock*, Civ. No. 6:25-
14 cv-01204-AA, 2025 WL 2430267, at *11 (D. Or. Aug. 21, 2025), a district court
15 recently granted a habeas petition because an informal interview given 27 days
16 after petitioner was taken into ICE custody “cannot reasonably be construed as . . .
17 prompt.” And in *Sayvongsa v. Noem*, 25-cv-2867-AGS-DEB (S.D. Cal. Oct. 31,
18 2025), Judge Schopler relied on this case and others to hold that a three-week
19 delay was not “prompt.” So here, as in those cases, a two-month delay “cannot
20 reasonably be construed as . . . prompt,” 2025 WL 2430267, and the government
21 has not complied with its own regulations.

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

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

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

3 Because the six-month grace period has passed, this court moves on to the
4 burden-shifting framework. The government does not deny that Mr. Phan has
5 provided “good reason” to doubt his reasonably foreseeable removal, thereby
6 forfeiting the issue. *See Moallin v. Cangemi*, 427 F. Supp. 2d 908, 928 (D. Minn.
7 2006). The burden therefore shifts to the government to prove that there is a
8 “significant likelihood of removal in the reasonably foreseeable future.”
9 *Zadvydas*, 533 U.S. at 701. That standard has a success element (“significant
10 likelihood of removal”) and a timing element (“in the reasonably foreseeable
11 future”). The government meets neither.

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

14 *First*, DO Cole’s assertion that “ICE routinely obtains travel documents for
15 Vietnamese citizens,” Doc. 7-1 at ¶ 14, does not show that a high *proportion* of
16 Vietnamese citizens are successfully removed when ICE seeks travel documents.
17 “[I]f the total number of requests that were made to Vietnam was disclosed, [this
18 Court] might be able to gauge how likely it is that Petitioner would be removed to
19 Vietnam. If DHS submitted 350 requests and Vietnam issued travel documents for
20 328 individuals, Respondents may very well have shown that removal is
21 significantly likely in the reasonably foreseeable future. On the other hand, if
22 DHS submitted 3,500 requests and only 328 individuals received travel
23 documents, Respondents would not be able to meet their burden.” *Nguyen*, 2025
24 WL 1725791, at *4; *accord Hoac*, 2025 WL 1993771, at *5. DO Cole provides
25 no ratio of requests to travels documents issued, precluding this kind of analysis.

26 Just as importantly, courts have “demanded an individualized analysis” of
27 why *this* person—Mr. Phan—will likely be removed. *Nguyen*, 2025 WL 2419288,
28 at *17 (citing *Nguyen*, 2025 WL 1725791, at *4). This Court cannot know if Mr.

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

11 *Second*, even if ICE had requested travel documents for Mr. Phan—and, to
12 date, it has not, Doc. 7-1 at ¶ 9—good faith efforts to secure a travel document do
13 not themselves satisfy *Zadvydas*. In fact, the petitioner in *Zadvydas* appealed a
14 “Fifth Circuit h[olding] [that] [the petitioner’s] continued detention [was] lawful
15 as long as good faith efforts to effectuate deportation continue and [the petitioner]
16 failed to show that deportation will prove impossible.” 533 U.S. at 702 (cleaned
17 up). The Supreme Court reversed, finding that the Fifth Circuit’s good-faith-
18 efforts standard “demand[ed] more than our reading of the statute can bear.” *Id.*

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

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

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

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

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1 That is fatal. “[D]etention may not be justified on the basis that removal to
2 a particular country is likely *at some point* in the future; *Zadvydas* permits
3 continued detention only insofar as removal is likely in the *reasonably*
4 *foreseeable* future.” *Hassoun*, 2019 WL 78984, at *6. “The government’s active
5 efforts to obtain travel documents from the Embassy are not enough to
6 demonstrate a likelihood of removal in the reasonably foreseeable future where
7 the record before the Court contains no information to suggest a timeline on
8 which such documents will actually be issued.” *Rual v. Barr*, No. 6:20-CV-06215
9 EAW, 2020 WL 3972319, at *4 (W.D.N.Y. July 14, 2020). “[I]f DHS has no idea
10 of when it might reasonably expect [Mr. Phan] to be repatriated, this Court
11 certainly cannot conclude that his removal is likely to occur—or even that it *might*
12 occur—in the reasonably foreseeable future.” *Singh v. Whitaker*, 362 F. Supp. 3d
13 93, 102 (W.D.N.Y. 2019).

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

3 In sum, then, there could be “some possibility that Vietnam will accept
4 Petitioner at some point. But that is not the same as a significant likelihood that he
5 will be accepted in the reasonably foreseeable future.” *Nguyen*, 2025 WL
6 2419288, at *16. Mr. Phan therefore succeeds under *Zadvydas*, too.

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

9 This Court should also prohibit ICE from removing Mr. Phan to a third
10 country without adequate notice. The government does not try to defend ICE’s
11 third-country removal policy on the merits. Instead, the government says that a
12 claims regarding third-country removal are “unfounded” because ICE professes
13 no current plans to remove Mr. Phan to a third country. Doc. 7 at 2–3.

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

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

1 risk that [Mr. Phan] will be subjected to improper process in relation to any third
2 country removal to warrant imposition of an injunction requiring additional
3 process.” *Y.T.D.*, 2025 WL 2675760, at *11.

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

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

12 In *Ibarra-Perez*, the Ninth Circuit squarely held that § 1252(g) does not
13 prohibit immigrants from asserting a “right to meaningful notice and an
14 opportunity to present a fear-based claim before [they] [are] removed,” *id.* at
15 *7¹—the same claim that Mr. Phan raises here with respect to third-country
16 removals. The Court reasoned that “§ 1252(g) does not prohibit challenges to
17 unlawful practices merely because they are in some fashion connected to removal
18 orders.” *Id.* Instead, § 1252(g) is “limited . . . to actions challenging the Attorney
19 General's discretionary decisions to initiate proceedings, adjudicate cases, and
20 execute removal orders.” *Arce v. United States*, 899 F.3d 796, 800 (9th Cir. 2018).
21 It does not apply to arguments that the government “entirely lacked the authority,
22 and therefore the discretion,” to carry out a particular action. *Id.* at 800. Thus,
23 § 1252(g) applies to “discretionary decisions that [the Secretary] actually has the
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26 ¹ Mr. Ibarra-Perez raised this claim in a post-removal Federal Tort Claims Act
27 (“FTCA”) case, *id.* at *2, while this is a pre-removal habeas petition. But the
28 analysis under § 1252(g) remains the same, because both Mr. Ibarra-Perez and
Mr. Phan are challenging the same kind of agency action. *See Kong*, 62 F.4th at
616–17 (explaining that a decision about § 1252(g) in an FTCA case would also
affect habeas jurisdiction).

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

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

24 **II. The remaining TRO factors decidedly favor Mr. Phan.**

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

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1 On the irreparable harm prong, “[i]t is well established that the deprivation
2 of constitutional rights ‘unquestionably constitutes irreparable injury.’” *Melendres*
3 *v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). And contrary to the government’s
4 arguments,² the Ninth Circuit has specifically recognized the “irreparable harms
5 imposed on anyone subject to immigration detention.” *Hernandez v. Sessions*, 872
6 F.3d 976, 995 (9th Cir. 2017). Furthermore, “[i]t is beyond dispute that Petitioner
7 would face irreparable harm from removal to a third country.” *Nguyen*, 2025 WL
8 2419288, at *26.

9 On the balance-of-equities/public-interest prong, the government is correct
10 that there is a “public interest in prompt execution of removal orders.” *Nken v.*
11 *Holder*, 556 U.S. 418, 436 (2009). But that interest is diminished here because the
12 government likely cannot remove Mr. Phan in the reasonably foreseeable future,
13 and even if it could, it is equally “well-established that ‘our system does not
14 permit agencies to act unlawfully even in pursuit of desirable ends.’” *Nguyen*,
15 2025 WL 2419288, at *28 (quoting *Ala. Ass’n of Realtors v. Dep’t of Health &*
16 *Hum. Servs.*, 594 U.S. 758, 766 (2021)). It also “would not be equitable or in the
17 public’s interest to allow the [government] to violate the requirements of federal
18 law” with respect to detention and re-detention, *Arizona Dream Act Coal. v.*
19 *Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014) (cleaned up), or to imperil the
20 “public interest in preventing aliens from being wrongfully removed,” *Nken*, 556
21 U.S. 418, 436.

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24 ² The government cites several cases to support the position that illegal
25 immigration detention is not irreparable harm. Doc. 7 at 13–14. But both cases
26 involved immigrants who (1) had already received a bond hearing and (2) were
27 actively appealing to the BIA, but (3) wanted a federal court to intervene before
28 the appeal was done. *Reyes v. Wolf*, No. C20-0377JLR, 2021 WL 662659, at *1
(W.D. Wash. Feb. 19, 2021), and *Lopez Reyes v. Bonnar*, No. 18-CV-07429-SK,
2018 WL 7474861, at *1–5 (N.D. Cal. Dec. 24, 2018). These courts indicated
only that post-bond-hearing detention pending an ordinary BIA appeal was not
irreparable harm. *Reyes*, 2021 WL 662659, at *3; *Lopez Reyes*, 2018 WL
7474861, at *10.

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