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

12 SAKDA XAYAKESONE,
13
14 Petitioner,

15 v.

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.

Civil Case No.: 25-cv-2995-JES-BJW

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

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1 INTRODUCTION

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

5 First, this Court should grant the petition on Claim One because the
6 government has not complied with its own regulations. For persons like
7 Mr. Xayakesone, those regulations permit re-detention only if ICE:

8 (1) “determines that there is a significant likelihood that the alien may be removed
9 in the reasonably foreseeable future,” *id.* § 241.13(i)(2); (2) makes that finding
10 “on account of changed circumstances,” *id.*; (3) provides “an initial informal
11 interview promptly,” *id.* §§ 241.4(I)(1), 241.13(i)(3); and (4) “affords the [person]
12 an opportunity to respond to the reasons for revocation,” *id.*

13 Yet ICE did none of these things when it arrested Mr. Xayakesone on
14 October 16, 2025. Although it provided a Notice of Revocation of Release that
15 vaguely claimed there were “changed circumstances,” Dkt. 7-2, Exhibits D, it
16 never explained what those changed circumstances were. Nor *have* there been any
17 changed circumstances, since the government admits that it hasn’t even submitted
18 a request to Laos for travel documents and thus does not have a travel document
19 for Mr. Xayakesone. And ICE does not even claim to have provided
20 Mr. Xayakesone the mandatory interview the regulations require. In the last
21 several weeks, multiple judges from this district have ordered release on similar
22 records. *See Constantinovici v. Bondi*, __ F. Supp. 3d __, 2025 WL 2898985, No.
23 25-cv-2405-RBM (S.D. Cal. Oct. 10, 2025); *Sayvongsa v. Noem*, 25-cv-2867-
24 AGS-DEB (S.D. Cal. Oct. 31, 2025); *Sphabmixay v. Noem*, 25-cv-2648-LL-VET
25 (S.D. Cal. Oct. 30, 2025); *Rokhfirooz v. Larose*, No. 25-cv-2053-RSH, 2025 WL
26 2646165 (S.D. Cal. Sept. 15, 2025); *Phan v. Noem*, 2025 WL 2898977, No. 25-
27 cv-2422-RBM-MSB, *3–*5 (S.D. Cal. Oct. 10, 2025); *Sun v. Noem*, 2025 WL
28 2800037, No. 25-cv-2433-CAB (S.D. Cal. Sept. 30, 2025); *Van Tran v. Noem*,

1 2025 WL 2770623, No. 25-cv-2334-JES, *3 (S.D. Cal. Sept. 29, 2025); *Truong v.*
2 *Noem*, No. 25-cv-02597-JES, ECF No. 10 (S.D. Cal. Oct. 10, 2025);
3 *Khambounheuang v. Noem*, No. 25-cv-02575-JO-SBC, ECF No. 12 (S.D. Cal.
4 Oct. 9, 2025).

5 Second, this Court should grant the petition on Claim Two because the
6 government provides no independent evidence to satisfy the success element (“a
7 significant likelihood of removal”) or timing element (“in the reasonably
8 foreseeable future”) of *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). Though
9 Deportation Officer (“DO”) Cole asserts that “ICE has been routinely obtaining
10 travel documents for Laos citizens” and purports to have removed some
11 individuals to Laos recently, Dkt. 7-2 at ¶ 20–21, he does not say what proportion
12 of Laotian citizens for whom travel documents are sought actually receive them.
13 Nor does DO Cole even claim that ICE has submitted a request for travel
14 documents for Mr. Xayakesone to Laos—only that it has been “expeditiously”
15 working to effectuate Mr. Xayakesone’s removal and has submitted a travel
16 document to various internal sources. *Id.* at ¶ 17, 18. Nor does DO Cole explain
17 what is different from the two other times when ICE tried but failed to remove
18 Mr. Xayakesone to Laos. Dkt. 7-2 at ¶ 5, 7. As other judges of this district have
19 held, a travel document request alone—with no evidence of likely success or
20 timing—does not satisfy the government’s burden. *See, e.g., Conchas-Valdez*,
21 2025 WL 2884822, No. 25-cv-2469-DMS (S.D. Cal. Oct. 6, 2025); *Rebenok v.*
22 *Noem*, No. 25-cv-2171-TWR, ECF No. 13 (S.D. Cal. Sept. 25, 2025); *Alic v.*
23 *Dep’t of Homeland Sec./Immigr. Customs Enf’t*, No. 25-CV-01749-AJB-BLM,
24 2025 WL 2799679 (S.D. Cal. Sept. 30, 2025).

25 Third, the government does not dispute that ICE’s third-country removal
26 policy violates due process. And the Ninth Circuit has squarely rejected the
27 government’s jurisdictional argument, holding that § 1252(g) does not prohibit
28 immigrants from asserting a “right to meaningful notice and an opportunity to

1 present a fear-based claim before [they] [are] removed,” or any other claim
2 asserting a “violation of [ICE’s] mandatory duties.” *Ibarra-Perez v. United States*,
3 ___ F.4th ___, 2025 WL 2461663, at *7, *9 (9th Cir. Aug. 27, 2025). The contrary
4 position would leave immigrants without protection from ICE’s policy, which
5 allows for a change of plans with minimal or no notice. Multiple judges in this
6 district have granted relief on this ground. *See, e.g., Rebenok v. Noem*, No. 25-cv-
7 2171-TWR at ECF No. 13; *Van Tran v. Noem*, 2025 WL 2770623 at *3; *Nguyen*
8 *Tran v. Noem*, No. 25-cv-2391-BTM, ECF No. 6 (S.D. Cal. Sept. 18, 2025);
9 *Louangmilith v. Noem*, 2025 WL 2881578, No. 25-cv-2502-JES, *4 (S.D. Cal.
10 Oct. 9, 2025). This Court should therefore grant the petition or a preliminary
11 injunction on all three grounds.

12 ARGUMENT

13 I. This Court has jurisdiction to consider Mr. Xayakesone’s claims.

14 To begin, this Court has jurisdiction to consider all of Mr. Xayakesone’s
15 claims. Contrary to the government’s arguments, § 1252(g) does not bar review of
16 “all claims arising from deportation proceedings.” *Reno v. Am.-Arab Anti-*
17 *Discrimination Comm.*, 525 U.S. 471, 482 (1999). Instead, courts “have
18 jurisdiction to decide a purely legal question that does not challenge the Attorney
19 General’s discretionary authority.” *Ibarra-Perez v. United States*, ___ F.4th ___,
20 2025 WL 2461663, at *6 (9th Cir. Aug. 27, 2025) (cleaned up).

21 In *Ibarra-Perez*, the Ninth Circuit squarely held that § 1252(g) does not
22 prohibit immigrants from asserting a “right to meaningful notice and an
23 opportunity to present a fear-based claim before [they] [are] removed,” *id.* at
24 *7¹—the same claim that Mr. Xayakesone raises here with respect to third-

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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. Xayakesone 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 country removals. The Court reasoned that “§ 1252(g) does not prohibit
2 challenges to unlawful practices merely because they are in some fashion
3 connected to removal orders.” *Id.* Instead, § 1252(g) is “limited . . . to actions
4 challenging the Attorney General's discretionary decisions to initiate proceedings,
5 adjudicate cases, and execute removal orders.” *Arce v. United States*, 899 F.3d
6 796, 800 (9th Cir. 2018). It does not apply to arguments that the government
7 “entirely lacked the authority, and therefore the discretion,” to carry out a
8 particular action. *Id.* at 800. Thus, § 1252(g) applies to “discretionary decisions
9 that [the Secretary] actually has the power to make, as compared to the violation
10 of his mandatory duties.” *Ibarra-Perez*, 2025 WL 2461663, at *9.

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

19 Other courts agree. *See, e.g., Kong*, 62 F.4th at 617 (“§ 1252(g) does not
20 bar judicial review of Kong's challenge to the lawfulness of his detention,”
21 including ICE’s “fail[ure] to abide by its own regulations”); *Cardoso v. Reno*, 216
22 F.3d 512, 516 (5th Cir. 2000) (“[S]ection 1252(g) does not bar courts from
23 reviewing an alien detention order[.]”); *Parra v. Perryman*, 172 F.3d 954, 957
24 (7th Cir. 1999) (1252(g) did not apply to a “claim concern[ing] detention”); *J.R. v.*
25 *Bostock*, No. 2:25-CV-01161-JNW, 2025 WL 1810210, at *3 (W.D. Wash. June
26 30, 2025) (1252(g) did not apply to claims that ICE was “failing to carry out non-
27 discretionary statutory duties and provide due process”); *D.V.D. v. U.S. Dep't of*
28 *Homeland Sec.*, 778 F. Supp. 3d 355, 377–78 (D. Mass. 2025) (§ 1252(g) did not

1 bar review of “the purely legal question of whether the Constitution and relevant
2 statutes require notice and an opportunity to be heard prior to removal of an alien
3 to a third country”).

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

8 **II. Mr. Xayakesone’s claims succeed on the merits.**

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

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

15 ICE’s regulatory violations alone are sufficient to grant the habeas petition
16 or TRO. First, ICE did not provide Mr. Xayakesone sufficient notice under 8
17 C.F.R. § 241.13 of the reasons for the revocation of his release. The Notice of
18 Revocation of Release simply states that this revocation was “based on a review
19 of your official alien file and a determination that there are changed circumstances
20 in your case.” Dkt. 7-2, Exhibit D. But “[s]imply to say that circumstances had
21 changed or there was a significant likelihood of removal in the foreseeable future
22 is not enough.” *Sarail A. v. Bondi*, No. 25-CV-2144, 2025 WL 2533673, at *3 (D.
23 Minn. Sept. 3, 2025). Rather, “Petitioner must be told *what* circumstances had
24 changed or *why* there was now a significant likelihood of removal in order to
25 meaningfully respond to the reasons and submit evidence in opposition, as
26 allowed under § 241.13(i)(3).” *Id.* By “identif[y]ing] the category—‘changed
27 circumstances’—but fail[ing] to notify [Petitioner] of the reason—the

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1 circumstances that changed and created a significant likelihood of removal in the
2 reasonably foreseeable future—[ICE] failed to follow the relevant regulation.” *Id.*

3 Nor *have* there been any “changed circumstances.”² The government argues
4 that “ICE’s revived ability to obtain travel documents from the Laotian
5 government and to schedule routine removal flights to Laos” constitutes “changed
6 circumstances.” Dkt. 7 at 12. But DO Cole’s statement does not establish that a
7 high *proportion* of Laotian citizens are successfully removed when ICE seeks
8 travel documents. “[I]f the total number of requests that were made to [Laos] was
9 disclosed, [this Court] might be able to gauge how likely it is that Petitioner
10 would be removed to [Laos]. If DHS submitted 350 requests and [Laos] issued
11 travel documents for 328 individuals, Respondents may very well have shown
12 that removal is significantly likely in the reasonably foreseeable future. On the
13 other hand, if DHS submitted 3,500 requests and only 328 individuals received
14 travel documents, Respondents would not be able to meet their burden.” *Nguyen*,
15 2025 WL 1725791, at *4; *accord Hoac*, 2025 WL 1993771, at *5. DO Cole
16 provides no ratio of requests to travels documents issued, precluding this kind of
17 analysis.

18 Just as importantly, courts have “demanded an individualized analysis” of
19 why *this* person—Mr. Xayakesone—will likely be removed. *Nguyen*, 2025 WL
20 2419288, at *17 (citing *Nguyen*, 2025 WL 1725791, at *4). Because “[t]he
21 government has not provided any evidence of [Laos’] eligibility criteria or why it
22 believes *Petitioner* now meets it,” the government’s evidence is insufficient. *Id.* at
23 *18 (emphasis added). Absent a travel document specific to Mr. Xayakesone—
24 which the government has not even requested from Laos yet, Dkt. 7-2 at ¶ 17–
25 18—nothing is different from the last two times ICE tried to remove him.

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28 ² Mr. Xayakesone agrees that he received several criminal convictions following
his order of removal and apologizes for the error. Dkt. 7 at 3 n.1.

1 Importantly, the government does not claim that it has *ever* provided
2 Mr. Xayakesone the mandatory interview the regulations require. 8 C.F.R.
3 §§ 241.4(l)(1). Given that Mr. Xayakesone has now been detained for 28 days, the
4 government has thus failed to provide this interview “*promptly* after his or her
5 return to Service custody.” 8 C.F.R. §§ 241.4(l)(1) (emphasis added). In *M.S.L. v.*
6 *Bostock*, Civ. No. 6:25-cv-01204-AA, 2025 WL 2430267, at *11 (D. Or. Aug. 21,
7 2025), a district court recently granted a habeas petition because an informal
8 interview given 27 days after petitioner was taken into ICE custody “cannot
9 reasonably be construed as . . . prompt.” And in *Sayvongsa v. Noem*, 25-cv-2867-
10 AGS-DEB (S.D. Cal. Oct. 31, 2025), Judge Schopler relied on this case and
11 others to hold that a three-week delay was not “prompt.” So here, even if the
12 government were to provide Mr. Xayakesone an interview today, his 28-day delay
13 in receiving it “cannot reasonably be construed as . . . prompt,” 2025 WL
14 2430267. Thus, the government has yet to comply with its own regulations.

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

24 Here, similarly, the government provides no documented determination that
25 ICE obtained—or even sought—a travel document before re-detaining
26 Mr. Xayakesone. Thus, nothing in the record suggests that there were “changed
27 circumstances” at the time of Mr. Xayakesone’s re-detention that would have
28 justified the revocation of his release under the regulations.

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

15 Here, the evidence is even weaker. DO Cole acknowledges that ICE has
16 twice been unable to deport Mr. Xayakesone in the past. Dkt. 7-2 at ¶ 5, 7. Other
17 than unsupported assertions that it is preparing a new request for travel
18 documents, DO Cole does not say what has changed since the last time ICE tried
19 to remove Mr. Xayakesone. Thus, there is “no evidence that DHS has made such
20 a determination as to the revocation of Petitioner's release even after the fact of
21 arrest, up to the present day.” *Rokhfirooz*, 2025 WL 2646165, at *4.

22 **B. Claim Two: 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. Xayakesone will
likely be removed to Laos at all, let alone in the reasonably foreseeable future.

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1 **1. The government cites no authority for the proposition that**
2 **Mr. Xayakesone has not satisfied the six-month *Zadvydas***
3 **grace period.**

4 As an initial matter, the government appears to contend that the six-month
5 grace period starts over every time ICE re-detains someone. Dkt. 7 at 7–9.
6 “Courts . . . broadly agree” that this is not correct. *Diaz-Ortega v. Lund*, 2019 WL
7 6003485, at *7 n.6 (W.D. La. Oct. 15, 2019), *report and recommendation*
8 *adopted*, 2019 WL 6037220 (W.D. La. Nov. 13, 2019); *see also Sied v. Nielsen*,
9 No. 17-CV-06785-LB, 2018 WL 1876907, at *6 (N.D. Cal. Apr. 19, 2018)
10 (collecting cases); *Nguyen v. Scott*, No. 2:25-CV-01398, 2025 WL 2419288, at
11 *13 (W.D. Wash. Aug. 21, 2025).

12 None of the government’s cited cases support that view, either. Dkt. 7 at 6–
13 8. Two of the cases involve petitioners who were *not* detained for a cumulative 6
14 months. *Ghamelian v. Baker*, No. CV SAG-25-02106, 2025 WL 2049981, at *1
15 (D. Md. July 22, 2025) (indicating in the statement of facts that petitioner was not
16 detained until 2025); *Guerra-Castro v. Parra*, No. 1:25-CV-22487, 2025 WL
17 1984300, at *4 & n.5 (S.D. Fla. July 17, 2025) (“Even if the Court counted
18 Petitioner’s previous ICE detention, Petitioner’s cumulative amount of detention
19 would not total 6 months.”). A third cited case contends that the statutorily-
20 defined 90-day removal period under 8 U.S.C. § 1231(a)(1)(B) starts over on re-
21 detention. *Farah v. INS*, No. Civ. 02-4725(DSD/RLE), 2003 WL 221809, at *5
22 (D. Minn. Jan. 29, 2013). But even a cursory review of § 1231(a)(1)(B) shows
23 that that is not true. The statute defines three, specific starting dates for the
24 removal period, none of which involve re-detention. *See Bailey v. Lynch*, No. CV
25 16-2600 (JLL), 2016 WL 5791407, at *2 (D.N.J. Oct. 3, 2016) (explaining this).
26 The six-month grace period has therefore ended, and so—contrary to the
27 government’s claims—Mr. Xayakesone need not rebut the “presumptively
28 reasonable period of detention.”

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

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. Xayakesone
5 has provided “good reason” to doubt his reasonably foreseeable removal, thereby
6 forfeiting the issue. *See* Dkt. 7 at 9. *Moallin v. Cangemi*, 427 F. Supp. 2d 908, 928
7 (D. Minn. 2006). The burden therefore shifts to the government to prove that there
8 is a “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. Xayakesone’s
13 removal to Laos is “significant[ly] like[ly].” *Zadvydas*, 533 U.S. at 701.

14 *First*, DO Cole’s assertion that “ICE has been routinely obtaining travel
15 documents for Laos citizens,” Dkt. 7-2 at ¶ 20, does not show that
16 Mr. Xayakesone’s removal is significantly likely. Again, the mere fact that ICE
17 may have picked up the pace of its deportations to Laos does not mean that a *high*
18 *proportion* of Laotians with final removal orders will be deported in the
19 reasonably foreseeable future. *See Nguyen*, 2025 WL 1725791, at *4; *accord*
20 *Hoac*, 2025 WL 1993771, at *5. What’s more, the government still has not
21 provided an “individualized analysis” of why *Mr. Xayakesone* can be removed.
22 *Nguyen*, 2025 WL 2419288, at *17.

23 Moreover, even if ICE *had* submitted a request for travel documents to
24 Laos—and, to date, it has not, Dkt. 7-2 at ¶ 17, 18—good faith efforts to secure a
25 travel document do not themselves satisfy *Zadvydas*. In fact, the petitioner in
26 *Zadvydas* appealed a “Fifth Circuit h[olding] [that] [the petitioner’s] continued
27 detention [was] lawful as long as good faith efforts to effectuate deportation
28 continue and [the petitioner] failed to show that deportation will prove

1 impossible.” 533 U.S. at 702 (cleaned up). The Supreme Court reversed, finding
2 that the Fifth Circuit’s good-faith-efforts standard “demand[ed] more than our
3 reading of the statute can bear.” *Id.*

4 Thus, “under *Zadvydas*, the reasonableness of Petitioner's detention does
5 not turn on the degree of the government's good faith efforts. Indeed, the
6 *Zadvydas* court explicitly rejected such a standard. Rather, the reasonableness of
7 Petitioner's detention turns on whether and to what extent the government's efforts
8 are likely to bear fruit.” *Hassoun v. Sessions*, No. 18-CV-586-FPG, 2019 WL
9 78984, at *5 (W.D.N.Y. Jan. 2, 2019). Accordingly, “the Government is required
10 to demonstrate the likelihood of not only the *existence* of untapped possibilities,
11 but also of a probability of success in such possibilities.” *Elashi v. Sabol*, 714 F.
12 Supp. 2d 502, 506 (M.D. Pa. 2010).

13 Here, then, “[w]hile the respondent asserts that [Mr. Xayakesone’s] travel
14 document requests with [the Laotian] Consulate[.]” will be lodged, “this is
15 insufficient. It is merely an assertion of good-faith efforts to secure removal; it
16 does not make removal likely in the reasonably foreseeable future.” *Gilali v.*
17 *Warden of McHenry Cnty.*, No. 19-CV-837, 2019 WL 5191251, at *5 (E.D. Wis.
18 Oct. 15, 2019). Many courts have agreed that requesting travel documents does
19 not itself make removal reasonably likely. *See, e.g., Andriasyan v. Gonzales*, 446
20 F. Supp. 2d 1186, 1189 (W.D. Wash. 2006) (holding evidence that the petitioner’s
21 case was “still under review and pending a decision” did not meet respondents’
22 burden); *Islam v. Kane*, No. CV-11-515-PHX-PGR, 2011 WL 4374226, at *3 (D.
23 Ariz. Aug. 30, 2011), *report and recommendation adopted*, 2011 WL 4374205
24 (D. Ariz. Sept. 20, 2011) (“Repeated statements from the Bangladesh Consulate
25 that the travel document request is pending does not provide any insight as to
26 when, or if, that request will be fulfilled.”); *Khader v. Holder*, 843 F. Supp. 2d
27 1202, 1208 (N.D. Ala. 2011) (granting petition despite pending travel document
28 request, where “[t]he government offers nothing to suggest when an answer might

1 be forthcoming or why there is reason to believe that he will not be denied travel
2 documents”); *Mohamed v. Ashcroft*, No. C01-1747P, 2002 WL 32620339, at *1
3 (W.D. Wash. Apr. 15, 2002) (granting petition despite pending travel document
4 request). That includes Judge Robinson’s recent ruling. *See supra*, Introduction
5 (explaining the *Rebenok* ruling).

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

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

14 That is fatal. “[D]etention may not be justified on the basis that removal to
15 a particular country is likely *at some point* in the future; *Zadvydas* permits
16 continued detention only insofar as removal is likely in the *reasonably*
17 *foreseeable* future.” *Hassoun*, 2019 WL 78984, at *6. “The government’s active
18 efforts to obtain travel documents from the Embassy are not enough to
19 demonstrate a likelihood of removal in the reasonably foreseeable future where
20 the record before the Court contains no information to suggest a timeline on
21 which such documents will actually be issued.” *Rual v. Barr*, No. 6:20-CV-06215
22 EAW, 2020 WL 3972319, at *4 (W.D.N.Y. July 14, 2020). “[I]f DHS has no idea
23 of when it might reasonably expect [Mr. Xayakesone] to be repatriated, this Court
24 certainly cannot conclude that his removal is likely to occur—or even that it *might*
25 occur—in the reasonably foreseeable future.” *Singh v. Whitaker*, 362 F. Supp. 3d
26 93, 102 (W.D.N.Y. 2019).

27 Courts have routinely granted habeas petitions where, as here, the
28 government does not establish *Zadvydas*’s timing element. *See, e.g., Balza v.*
Barr, No. 6:20-CV-00866, 2020 WL 6143643, at *5 (W.D. La. Sept. 17, 2020),

1 *report and recommendation adopted*, No. 6:20-CV-00866, 2020 WL 6064881
2 (W.D. La. Oct. 14, 2020) (“[A] theoretical possibility of eventually being
3 removed does not satisfy the government's burden[.]”); *Eugene v. Holder*, No.
4 408CV346-RH WCS, 2009 WL 931155, at *4 (N.D. Fla. Apr. 2, 2009) (“While
5 Respondents contend Petitioner *could* be removed to Haiti, it has not been shown
6 that it is significantly likely that Petitioner *will* be removed in the *reasonably*
7 *foreseeable* future.”); *Abdel-Muhti v. Ashcroft*, 314 F. Supp. 2d 418, 426 (M.D.
8 Pa. 2004) (granting petition because even if “Petitioner's removal will ultimately
9 be effected . . . the Government has not rebutted the presumption that removal is
10 not likely to occur in the reasonably foreseeable future”); *Seretse-Khama v.*
11 *Ashcroft*, 215 F. Supp. 2d 37, 50 (D.D.C. 2002) (granting petition where the
12 government had not provided any “evidence . . . that travel documents will be
13 issued in a matter of days or weeks or even months”).

14 In sum, then, there could be “some possibility that [Laos] will accept
15 Petitioner at some point. But that is not the same as a significant likelihood that he
16 will be accepted in the reasonably foreseeable future.” *Nguyen*, 2025 WL
17 2419288, at *16. Mr. Xayakesone therefore succeeds under *Zadvydas*, too.

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

21 This Court should also prohibit ICE from removing Mr. Xayakesone to a
22 third country without adequate notice. The government does not try to defend
23 ICE’s third-country removal policy on the merits. Instead, the government says
24 that a third-country removal challenge is nonjusticiable under Article III because
25 ICE professes no current plans to remove Mr. Xayakesone to a third country. Dkt.
26 7 at 4–5.

27 But “[t]here, so to speak, lies the rub.” *D.V.D. v. U.S. Dep’t of Homeland*
28 *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

1 ripe[.]” *Id.* But under ICE’s policy, “there is no notice” for certain removals and
2 inadequate notice for others. *Id.* And if Mr. Xayakesone “is removed” before he
3 can raise this challenge, Respondents will then argue that “there is no
4 jurisdiction” to bring him back to the United States. *Id.*

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

20 **III. The remaining TRO factors decidedly favor Mr. Xayakesone.**

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

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

28 //

1 arguments,³ the Ninth Circuit has specifically recognized the “irreparable harms
2 imposed on anyone subject to immigration detention.” *Hernandez v. Sessions*, 872
3 F.3d 976, 995 (9th Cir. 2017). Furthermore, “[i]t is beyond dispute that Petitioner
4 would face irreparable harm from removal to a third country.” *Nguyen*, 2025 WL
5 2419288, at *26.

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

19 Conclusion

20 For all these reasons, this Court should grant the petition, or at least enter a
21 temporary restraining order and injunction. In either case, the Court should
22
23

24 ³ The government cites several cases to support the position that illegal
25 immigration detention is not irreparable harm. Dkt. 7 at 15, 16. 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.

1 (1) order Mr. Xayakesone's immediate release, and (2) prohibit the government
2 from removing Mr. Xayakesone to a third country without following the process
3 laid out in *D.V.D. v. U.S. Dep't of Homeland Sec.*, No. CV 25-10676-BEM, 2025
4 WL 1453640, at *1 (D. Mass. May 21, 2025).

5 Respectfully submitted,

6
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s/ Kara Hartzler

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