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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

NGHIEP KE LAM, Petitioner v. SERGIO ALBARRAN, et al., Respondents	No. 3:25-cv-09980 **RESPONDENTS' OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER**

I. INTRODUCTION

Petitioner is a citizen and national of Vietnam who has been ordered removed to that country due to his serious criminal history. He was admitted to the United States as a refugee in 1980, but lost his lawful immigration status in 2016 after his criminal conviction for murder. Pet. ¶ 5, 6. He was released from Immigration and Customs Enforcement's ("ICE") custody under an order of supervision because the government had been unable to obtain a travel document from Vietnam, but he remains subject to a final order of removal. He has been subject to periodic check-in appointments with ICE while he awaits removal.

Years ago, it was not possible to remove certain Southeast Asian nationals from the United States because of the political relationship between the two nations. That changed in recent years, however, as Vietnam began accepting its removed citizens. *See Trinh v. Homan*, 466 F.3d 1077, 1090 (C.D. Cal. 2020). Accordingly, ICE is now routinely obtaining travel documents from Vietnam and is able to arrange travel itineraries to execute final orders of removal for Vietnamese citizens, including those who immigrated to the United States before 1995, like Petitioner.

At a check-in appointment last month, ICE provided Petitioner with a travel document application and asked him to return a month later to submit his completed application. Petitioner was not detained at that appointment last month, is not currently in custody, and was not told that ICE intends to arrest him at his appointment tomorrow. Yet he now asks this Court to provide him the extraordinary relief of a temporary restraining order to prevent his hypothetical *future* custody. This relief exceeds the permissible scope of habeas relief and should be denied.

If Petitioner is in fact detained at his check-in and he claims that the arrest was improper, he can file a petition at that time, and the Court can then evaluate the basis for any detention. But even in that case, Petitioner's detention would be justified so that ICE can execute the order of removal, which has long been final, to Vietnam. The premise of Petitioner's TRO motion—that ICE is unable to execute his removal due to an "agreement between Vietnam and the U.S. government that he could not be repatriated to Vietnam by reason of having entered the United States before July 1995," Dkt. No. 1 ("Pet.") ¶ 6, is simply not accurate. *See also* Dkt. No. 3 at 1, 4. Removal flights are currently operating between Vietnam and the United States, and Vietnamese nationals are being removed to Vietnam on a

regular basis. Petitioner will not be able to establish that removal to Vietnam is not reasonably foreseeable, and his detention without a pre-deprivation hearing would be authorized under 8 U.S.C. § 1236(a)(6), as set forth in *Zadvydas v. Davis*, 533 U.S. 678 (2001). Petitioner thus cannot show a likelihood of success on the underlying merits, and his motion for a temporary restraining order should be denied.

II. ARGUMENT

A. Legal Standard

A temporary restraining order is "an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012). In general, the showing required for a temporary restraining order ("TRO") is the same as that required for a preliminary injunction. *See Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush & Co., Inc.*, 240 F.3d 832, 839 (9th Cir. 2001). To obtain relief, the moving party must show 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. NRDC*, 555 U.S. 7, 20 (2008); *see Nken v. Holder*, 556 U.S. 418, 426 (2009). Petitioner must demonstrate a "substantial case for relief on the merits." *Leiva-Perez v. Holder*, 640 F.3d 962, 967-68 (9th Cir. 2011). When "a plaintiff has failed to show the likelihood of success on the merits, we need not consider the remaining three Winter elements." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (citations omitted).

B. Habeas Relief Is Both Inappropriate and Premature Because Petitioner Is Challenging His Hypothetical Future Detention.

Habeas relief is an appropriate request when an individual is detained and requesting release from that detention. U.S. CONST. Art. 1, § 9, Cl. 2; 28 U.S.C. § 2241(c) ("The writ of habeas corpus shall not extend to a prisoner unless [h]e is in custody "); *Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 117–18 (2020) ("[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and [] the traditional function of the writ is to secure release from illegal custody."). An individual does not need to be in actual physical custody to seek habeas relief; the "in custody" requirement may be satisfied where an individual's release from detention is subject to specific

conditions or restraints. *See Dow v. Cir. Ct. of the First Circuit*, 995 F.2d 922, 923 (9th Cir. 1993) (holding that release subject to mandatory attendance at alcohol rehabilitation classes constituted "custody" for habeas purposes).

Here, Petitioner does not meet the "in custody" requirement despite being released on an order of supervision and subject to certain conditions of release. *See* Pet. ¶ 7, 49. But his habeas petition does not purport to challenge that custodial arrangement, i.e. the order of supervision and its terms, or secure his release from any present "custody." Petitioner is not in physical custody and is not challenging whatever restraints ICE has currently imposed. Rather, Petitioner seeks an injunction to prevent his hypothetical future arrest and the possibility of future detention. The habeas relief that he seeks is not connected to the immigration custody on which he bases his petition. Thus, Petitioner does not seek a remedy that sounds in habeas. *See J.P. v. Santacruz, et al.*, No. 25-cv-1640 (C.D. Cal. Aug. 27, 2020), Dkt. No. 20. In *J.P.*, the court held that even assuming ICE's order of supervision ("OSUP") satisfied the "in custody" requirement, "Petitioner fails to adequately demonstrate he is challenging his confinement." The court specifically noted that challenges to *future* detention did not fall within habeas jurisdiction:

> Here, Petitioner does not challenge the lawfulness of his alleged custody. . . . Rather, Petitioner challenges his *potential* confinement absent a pre-deprivation hearing before a neutral adjudicator. . . . Petitioner's concern about re-detention stems from Respondents indication that they *may possibly* re-detain Petitioner at a future in-person appointment that the ISAP scheduled. . . . Based on the record in this case, the court would not find that Petitioner adequately demonstrates a challenge to his custody.

Petitioner's claim here similarly challenges his hypothetical future confinement, not his present "custody," and therefore habeas jurisdiction is inappropriate.

Petitioner does not know whether he will be detained at his appointment tomorrow. He has filed this petition not because he knows that he will be detained but because ICE has not provided him assurances that he will not be detained. Pet. ¶ 9, 38. This does not provide the basis for the extraordinary remedy of a temporary restraining order. Petitioner is seeking an insurance policy from the Court to guarantee that he will not be detained. That is not the purpose of a habeas petition, and it is not the purpose of a TRO. Thousands of individuals are subject to orders of supervision and are required to report to ICE on a periodic basis as part of those orders. If each such individual were entitled

to bring a habeas petition in advance of every such appointment and secure a temporary restraining order to prevent ERO from undertaking hypothetical future actions, this would expand the Court's habeas jurisdiction into virtually unlimited territory, and impose unreasonable burdens on both the Court and Respondents. The implicit requirement that ERO must in all instances inform individuals in advance of their check-in appointments what will transpire at those appointments, on penalty of being enjoined from undertaking hypothetical enforcement actions, is unwarranted, and would unduly interfere with ERO's enforcement mission. The sheer volume of check-ins every day, combined with the potential risk to officer safety, risk of flight of certain individuals, and need to maintain enforcement discretion and secrecy in some instances, makes any advance disclosure requirement both unreasonable and potentially dangerous.

In sum, this petition is premature. If Petitioner is in fact detained at his next appointment and he believes that the detention is unwarranted, he can file a petition and TRO motion at that time. But the Court should not be in the business of guaranteeing to every individual who is subject to an order of supervision and is required to appear at check-in appointments with ICE that they will not be detained at any future check-in.

C. Petitioner Cannot Establish A Likelihood Of Success On The Merits

Likelihood of success on the merits is a threshold issue. *See Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (citations omitted). Here, Petitioner argues that this Court should prohibit Respondents from detaining Petitioner because they have no legal basis to redetain him unless "a neutral adjudicator" at a pre-deprivation hearing determines that Petitioner's removal is reasonably foreseeable. Pet. ¶ 60, 63, 74, 76. However, Petitioner cannot establish that he is likely to succeed on the underlying merits of this claim because he can be properly detained under 8 U.S.C. § 1231(a) and *Zadvydas* without a pre-deprivation hearing, and, even if given a pre- or post-deprivation hearing, he cannot show that removal is not reasonably foreseeable. Thus, the absence of any claimed hearing is not prejudicial.

1. Removal of Pre-1995 Vietnamese Immigrants.

Historically, there were political barriers to removing citizens of Vietnam, as well as other Southeast Asian nations. Those barriers generated litigation, and many otherwise removable noncitizens—like Petitioner—were released because they could not be removed. But those barriers

were eventually dismantled. In November 2020, "the United States and Vietnam signed a Memorandum of Understanding ("MOU") to create a process for deporting pre-1995 Vietnamese immigrants." *Nguyen v. Scott*, No. 2:25-CV-01398, 2025 WL 2165995, at *4 (W.D. Wash. July 30, 2025). Vietnamese citizens and citizens of similar regional nations are now regularly removed. A few years ago, Judge Carney discussed the salient points in his summary judgment ruling in the putative class action case of *Trinh v. Homan*, 466 F.3d 1077 (C.D. Cal. 2020). As Judge Carney found:

> The parties now agree that Vietnam does not maintain a blanket policy of refusing to repatriate pre-1995 immigrants. Instead, Vietnam now considers each request from ICE on a case-by-case basis. ICE frequently requests travel documents from Vietnam for pre-1995 immigrants, and Vietnam issues them in a non-negligible portion of cases. Petitioners do not appear to dispute that once Vietnam issues a travel document, removal becomes significantly likely, rendering class member unable to meet their initial burden under *Zadvydas*.
>
> *Trinh*, 466 F. Supp. 3d at 1090 (cleaned up).

Removal to Vietnam is thus now readily accomplished. For example, in another unreasonably prolonged detention habeas petition, the government demonstrated that the petitioner's removal to Vietnam was being scheduled and flights to Vietnam purchased. *See Huynh v. Semaia, et al.*, 24-cv-10901 (C.D. Cal.). The petition was thus held in abeyance. *See id.* at Dkt. 11. The detained petitioner was then indeed promptly removed to Vietnam, thereby mooting his habeas petition, which was dismissed accordingly on April 9, 2025. *See id.* at Dkt. 12; s*ee also Dabona Tang v. Kristi Noem*, 25-cv-04638 (C.D. Cal.). Indeed, in 2025, ICE has removed at least 587 Vietnamese nationals to Vietnam. Of those, 324 were Vietnamese citizens who immigrated to the United States before July 12, 1995. *See* Declaration of Deportation Officer Jason Cole ("Cole Decl.") ¶ 14, filed November 18, 2025, in *Hai Duc Vo v. Noem*, No. 25-cv-03031 (S.D. Cal.), Dkt. No. 12-1 (attached hereto).

2. In The Event ICE Detains Petitioner, Petitioner's Detention Would Be Legally Sound Because His Removal Is Reasonably Foreseeable.

An alien ordered removed must be detained for ninety days pending the government's efforts to secure the alien's removal through negotiations with foreign governments. *See* 8 U.S.C. § 1231(a)(2) (the Attorney General "shall detain" the alien during the 90-day removal period). The statute "limits an alien's post-removal detention to a period reasonably necessary to bring about the alien's removal from the United States" and does not permit "indefinite detention." *Zadvydas*, 533 U.S. at 689. The Supreme

Court has held that a six-month period of post-removal detention constitutes a "presumptively reasonable period of detention." *Id.* at 683. Even still, release is not mandated after the expiration of the six-month period unless "there is no significant likelihood of removal in the reasonably foreseeable future." *Id.* at 701. Petitioner has yet to reach six months of detention so his detention is still within the presumptively reasonable period and he cannot yet challenge whether his removal is reasonably foreseeable. *See* Pet. ¶ 6. Neither *Zadvydas* nor the relevant statutes and regulations contemplate any pre-deprivation hearing on the issue of the foreseeability of removal, nor any on other issue for that matter. *See Johnson v. Arteaga-Martinez,* 596 U.S. 573 (2022) (holding that § 1231(a)(6) does not require bond hearings before immigration judges after six months of detention in which the Government bears the burden of proving by clear and convincing evidence that a noncitizen poses a flight risk or a danger to the community.).

Even if Petitioner were detained for more than six months, the Court in *Zadvydas* held that detention can extend beyond the initial presumptively reasonable six-month period: "This 6-month presumption, of course, does not mean that every alien not removed must be released after six months. To the contrary, an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.* at 701. "After this 6-month period, *once the alien* 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 that the noncitizen has the initial burden of proving that removal is not significantly likely." *Id.* (emphasis added). The Ninth Circuit has emphasized, "*Zadvydas* places the burden on the alien to show, after a detention period of six months, that there is 'good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future.'" *Pelich v. INS*, 329 F. 3d 1057, 1059 (9th Cir. 2003) (quoting *Zadvydas*, 533 U.S. at 701); *see also Xi v. INS*, 298 F.3d 832, 840 (9th Cir. 2003).

Even if Petitioner's length of detention places him out of the six-month presumptively reasonably detention period, it is Petitioner's burden, not the Government's, to show that his removal is not reasonably foreseeable. And he has not established that. Petitioner claims his removal is not reasonably foreseeable at this juncture given due to the still-existing repatriation agreement between the

U.S. and Vietnam. Petitioner's arguments, however, are contradicted by evidence of recent removals between the U.S. and Vietnam. ICE had been successfully obtaining travel documents for Vietnamese citizens who immigrated to the United States before 1995 and removing them. *See* Cole Decl ¶¶ 12-14, 16; *see also Nguyen v. Noem*, No. 25-cv-2501, ECF Nos. 7, 9 (S.D. Cal. Nov. 14, 2025); *Ngo v. Noem*, No. 25-cv-02739, ECF Nos. 10, 11 (S.D. Cal. Oct. 23, 2025).

ICE has requested that Petitioner arrive to his next check-in with a completed travel document application. ICE will then submit the travel document request packet to obtain a travel document for Petitioner to Vietnam. Once ICE receives Petitioner's travel document, he can be promptly removed, as ICE has routine flights to Vietnam. Cole Decl. ¶¶ 16-17.

Though Petitioner may not yet have an approved travel document, ICE can detain him while the parties work toward obtaining a travel document. In *Zadvydas*, the Supreme Court held: "[T]he habeas court must ask whether the detention in question exceeds a period reasonably necessary to secure removal. It should measure reasonableness primarily in terms of the statute's basic purpose, namely, assuring the alien's presence at the moment of removal." *Id.* at 699 (emphasis added). Thus, detention pending efforts to obtain travel documents, which are "necessary to secure removal," is presumptively reasonable because the noncitizen's assistance is needed to obtain the travel documents, and a noncitizen who is subject to an imminent, executable warrant of removal becomes a significant flight risk, especially if he or she is aware that it is imminent. Once travel documents are obtained and ICE can place noncitizens on a removal flight, the imminence of removal reaches a high point along with the incentive for flight.

Under *Zadvydas*, the government is not required to pre-arrange a noncitizen's removal travel before detaining him. Indeed, it would be extremely difficult to do so. The constitutional standard is whether there is a significant likelihood of removal in the reasonably foreseeable future, not whether removal is imminent. A finding that requires Respondents to obtain travel documents before re-detaining noncitizens subject to final orders of removal transforms the *Zadvydas* standard into an imminent one and creates unreasonable obstacles to effectuate removal.

Courts properly deny *Zadvydas* claims when removal remains reasonably foreseeable. See *Malkandi v. Mukasey*, No. 07-cv-1858, 2008 WL 916974, at *1 (W.D. Wash. Apr. 2, 2008) (denying

Zadvydas petition where petitioner had been detained more than 14 months post-final order); *Nicia v. ICE Field Off. Dir.*, No. 13-cv-0092, 2013 WL 2319402, at *3 (W.D. Wash. May 28, 2013) (holding petitioner "failed to satisfy his burden of showing that there is no significant likelihood of his removal in the reasonably foreseeable future" where he had been detained more than seven months post-final order). Courts have found that "evidence of progress, albeit slow progress, in negotiating a petitioner's repatriation will satisfy *Zadvydas* until the petitioner's detention grows unreasonably lengthy." *Kim v. Ashcroft*, No. 02-cv-1524, ECF No. 25 at 8:8–10 (S.D. Cal. June 2, 2003) (finding that petitioner's one year and four-month detention does not violate *Zadvydas* given respondent's production of evidence showing governments' negotiations are in progress and there is reason to believe that removal is likely in the foreseeable future); *see also Marquez v. Wolf*, No. 20-cv-1769, 2020 WL 6044080, at *3 (S.D. Cal. Oct. 13, 2020) (denying petition because "Respondents have set forth evidence that demonstrates progress and the reasons for the delay in Petitioner's removal"); *Sereke v. DHS*, Case No. 19-cv-1250, ECF No. 5 at 5:4–6 (S.D. Cal. Aug. 15, 2019) ("[T]he record at this stage in the litigation does not support a finding that there is no significant likelihood of Petitioner's removal in the reasonably foreseeable future.").

Thus, because Petitioner's detention would comply with the reasonably foreseeable standard in *Zadvydas*, Petitioner cannot establish that his detention would be unlawful, and his TRO motion should be denied.

3. Petitioner's Claims and Requests are Barred by 8 U.S.C. § 1252

Petitioner bears the burden of establishing that this Court has subject matter jurisdiction over his claims. *See Ass'n of Am. Med. Coll. v. United States*, 217 F.3d 770, 778-79 (9th Cir. 2000); *Finley v. United States*, 490 U.S. 545, 547-48 (1989). To the extent Petitioner's claims arise from—or seek to enjoin—the decision to execute his removal order, they are jurisdictionally barred under 8 U.S.C. § 1252(g). Courts lack jurisdiction over any claim or cause of action arising from any decision to commence or adjudicate removal proceedings or execute removal orders. *See* 8 U.S.C. § 1252(g) ("Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of

any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or *execute removal orders* against any alien under this chapter."); *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) ("There was good reason for Congress to focus special attention upon, and make special provision for, judicial review of the Attorney General's discrete acts of "commenc[ing] proceedings, adjudicat[ing] cases, [and] execut[ing] removal orders"—which represent the initiation or prosecution of various stages in the deportation process."). In other words, § 1252(g) removes district court jurisdiction over "three discrete actions that the Attorney General may take: her 'decision or action' to 'commence proceedings, adjudicate cases, or execute removal orders.'" *Reno*, 525 U.S. at 482 (emphasis removed).

Here, Petitioner has a final order of removal, and to the extent he is detained, it would be to execute a final order of removal. Petitioner's claims therefore necessarily arise "from the decision or action by the Attorney General to . . . execute removal orders," over which Congress has explicitly foreclosed district court jurisdiction. 8 U.S.C. § 1252(g); *see* 8 U.S.C. § 1252(f)(2) ("Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law."). Accordingly, to the extent Petitioner's claims arise from, or seek to enjoin, the decision to execute his removal order, the Court should deny and dismiss those claims for lack of jurisdiction under 8 U.S.C. § 1252.

4. This Court Lacks Jurisdiction Over Petitioner's Third Country Removal Claim.

Finally, this Court lacks jurisdiction to address Petitioner's claim that he must be provided with notice and an adequate opportunity to apply for fear-based relief prior to any third country removal. Pet. ¶ 3, 16. The Constitution limits federal judicial power to designated "cases" and "controversies." U.S. Const., Art. III, § 2; *SEC v. Medical Committee for Human Rights*, 404 U.S. 403, 407 (1972) (federal courts may only entertain matters that present a "case" or "controversy" within the meaning of Article III). "Absent a real and immediate threat of future injury there can be no case or controversy, and thus no Article III standing for a party seeking injunctive relief." *Wilson v. Brown*, No. 05-cv-1774-BAS-MDD, 2015 WL 8515412, at *3 (S.D. Cal. Dec. 11, 2015) (citing *Friends of the Earth, Inc. v. Laidlow*

Env't Servs., Inc., 528 U.S. 167, 190 (2000) ("[I]n a lawsuit brought to force compliance, it is the plaintiff's burden to establish standing by demonstrating that, if unchecked by the litigation, the defendant's allegedly wrongful behavior will likely occur or continue, and that the threatened injury if certainly impending."). At the "irreducible constitutional minimum," standing requires that a plaintiff demonstrate the following: (1) an injury in fact (2) that is fairly traceable to the challenged action of the United States and (3) likely to be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

Here, Respondents have not indicated that they seek to remove Petitioner to a third country and instead are seeking to obtain travel documents to remove Petitioner to Vietnam. As such, there is no controversy concerning third country resettlement for the Court to resolve. Federal courts do not have jurisdiction "to give opinion upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992). "A claim is moot if it has lost its character as a present, live controversy." *Rosemere Neighborhood Ass'n v. U.S. Env't Prot. Agency*, 581 F.3d 1169, 1172-73 (9th Cir. 2009). The Court therefore lacks jurisdiction over Petitioner's claims concerning third country resettlement because there is no live case or controversy. *See Powell v. McCormack*, 395 U.S. 486, 496 (1969); *see also Murphy v. Hunt*, 455 U.S. 478, 481 (1982).

III. CONCLUSION

In light of the foregoing, the Court should deny Petitioner's request for a temporary restraining order.

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Respectfully submitted,

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