Jessie Agatstein
Cal. Bar No. 319817
**Federal Defenders of San Diego, Inc.**
225 Broadway, Suite 900
San Diego, California 92101-5030
Telephone: (619) 234-8467
Facsimile: (619) 687-2666
jessie_agatstein@fd.org

Attorneys for Mr. Ngo

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

PHUOC VAN NGO,

Petitioner,

v.

KRISTI NOEM, Secretary of the Department of Homeland Security, PAMELA JO BONDI, Attorney General, TODD M. LYONS, Acting Director, Immigration and Customs Enforcement, JESUS ROCHA, Acting Field Office Director, San Diego Field Office, CHRISTOPHER LAROSE, Warden at Otay Mesa Detention Center,

Respondents.

Case No.: 25-cv-3234-JLS-MMP

**Traverse in Support of Petition for Writ of Habeas Corpus and Reply in Support of Motion for Temporary Restraining Order**

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## I. Introduction

The government's return and opposition includes a declaration from a San Diego deportation officer explaining that:

- "On February 15, 1996," after Mr. Ngo had been in immigration custody for eight months after he was ordered removed to Vietnam, he was released because "the government was unable to obtain travel documents";
- Mr. Ngo was brought into immigration custody nine more times between 1997 and 2012, and each time, ICE released him and did not remove him;
- ICE arrested Mr. Ngo on November 7, 2025, and has not provided him "an informal interview";
- ICE does not have a copy of Mr. Ngo's 1995 removal order;
- ICE has not yet requested that Vietnam issue Mr. Ngo a travel document; and
- ICE removed 324 Vietnamese immigrants who came to the U.S. before 1995 last fiscal year; ECF No. 6, Declaration of Jason Cole, ¶¶ 4–7, 9, 12.

This evidence does not rebut Mr. Ngo's claim that he was re-detained in violation of his regulatory and due process rights to be notified of "the reasons for revocation." § 241.13(i)(2)(iii), 241.13(*l*)(1). "[A] reason is what makes an action intelligible, accounted for, or explained"—"the specific facts supporting ICE's decision." *Sarail A. v. Bondi*, __ F. Supp. __, 2025 WL 2533673, *5–*6 (D. Minn. 2025). Nor do they rebut Mr. Ngo's claim that ICE never made a determination before his re-detention that "there is a significant likelihood that [he] may be removed in the reasonably foreseeable future," § 241.13(i)(2), or his claim that he was not "promptly" given an "informal interview" or "afford[ed] . . .

an opportunity to respond to the reasons for revocation," *id.* §§ 241.4(*l*)(1), 241.13(i)(3).

Nor does the government rebut Mr. Ngo's claim that there is not an individualized, significant likelihood of his removal in the foreseeable future. ICE tried and failed to obtain a travel document for Mr. Ngo potentially up to ten times in the last three decades. The only evidence ICE presents now is that it succeeded in obtaining travel documents for 324 pre-1995 Vietnamese immigrants last year—without information as to how many requests ICE made for pre-1995 immigrants, how long it took to receive those travel documents, or whether those immigrants had previously been denied travel documents.

This Court should grant Mr. Ngo's petition, or, in the alternative, grant his motion for temporary relief in full.[1]

## II. Mr. Ngo's claims are not barred by 8 U.S.C. § 1252(g).

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

In *Ibarra-Perez*, the Ninth Circuit squarely held that § 1252(g) does not prohibit immigrants from asserting a "right to meaningful notice and an opportunity to present a fear-based claim before [they] [are] removed." *Id.* at *7. The Court reasoned that "§ 1252(g) does not prohibit challenges to unlawful practices merely because they are in some fashion connected to removal orders." *Id.* Instead, § 1252(g) is "limited . . . to actions challenging the Attorney General's

[1] To clarify, Mr. Ngo is not seeking any relief related to the government's third-country removal policy. He apologizes for the errors in his petition and his motion for temporary restraining order briefly mentioning that policy.

discretionary decisions to initiate proceedings, adjudicate cases, and execute removal orders." *Arce v. United States*, 899 F.3d 796, 800 (9th Cir. 2018). The statute does not apply to arguments that the government "entirely lacked the authority, and therefore the discretion," to carry out a particular action. *Id.* at 800. Instead, § 1252(g) applies to "discretionary decisions that [the Secretary] actually has the power to make, as compared to the violation of his mandatory duties." *Ibarra-Perez*, 2025 WL 2461663, at *9.

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

In short, Mr. Ngo does not challenge whether the government may "execute" his removal under 8 U.S.C § 1252(g)—only whether it may detain him up to the date it does so. This Court has jurisdiction.

## III. Mr. Ngo's claims succeed on the merits.

### A. Claim One: ICE did not adhere to key regulations implementing the due process rights to notice and a meaningful opportunity to be heard, warranting release.

#### 1. Mr. Ngo did not receive notice of the reasons for his revocation or have an opportunity to promptly contest them.

The government does not claim to have fully complied with 8 C.F.R. §§ 241.4 and 241.13. *See* ECF No. 6 at 11–14. For Mr. Ngo, those regulations permit his re-detention only if ICE: (1) "determines that there is a significant likelihood that the alien may be removed in the reasonably foreseeable future," § 241.13(i)(2); (2) makes that finding "on account of changed circumstances," *id.*; (3) "upon revocation," "notifie[s]" the noncitizen "of the reasons for revocation of

his or her release," § 241.13(i)(2)(iii), 241.4(*l*)(1); and (4) "conduct[s] an initial informal interview promptly after his or her return to Service custody to afford the [person] an opportunity to respond to the reasons for revocation stated in the notification." *Id.*

As Mr. Ngo explained in his petition and motion, ICE did not comply with these requirements.

First, the evidence before this Court still indicates ICE did not determine that there were "changed circumstances" such that, unlike the ten times he was previously in ICE custody, there is now "a significant likelihood that [Mr. Ngo] may be removed in the reasonably foreseeable future." § 241.13(i)(2). ICE did not even have a copy of Mr. Ngo's removal order when it arrested him. It still does not. ECF No. 6, Declaration of Jason Cole, ¶ 9. It has not yet even requested travel documents from Vietnam for Mr. Ngo, almost a month into his re-detention. *Id.* It is still seeking to remove Mr. Ngo under the same memorandum of understanding between the United States and Vietnam that has been in effect for the last five years. *See* ECF No. 1 at 5–6 (explaining this memorandum of understanding and that its criteria have been shielded from public view).

Next, upon Mr. Ngo's revocation, ICE did not notify him of "the reasons for revocation of his . . . release." § 241.13(i)(2)(iii); § 241.4(*l*)(1). He was given a written notice of revocation in English, a language he does not speak. ECF No. 1, Exhibit A, ¶¶ 4–5. Even if he did speak English, the notice said only that his supervision was being revoked "based on a review of your official alien file." ECF No. 1, Exhibit B (Notice of Revocation of Release). As Judge Montenegro recently explained as to an identically worded written revocation notification, "ICE's conclusory explanations for revoking Petitioner's release 'did not offer him adequate notice of the basis for the revocation decision such that he could meaningfully respond at the post-detention informal interview.'" *Raskhamdee v. Noem*, No.25-cv-2816-RBM-DEB, 2025 WL 3102037, *4 (S.D. Cal. Nov. 6,

2025) (quoting *Diaz v. Wofford*, No. 25-cv-1079-JLT-EPG, 2025 WL 2581575, *8 (E.D. Cal. Sept. 5, 2025)); *accord Quoc Anh Nguyen v. Noem*, No. 25-cv-2792-LL-VET, 2025 WL 3101979, *2 (S.D. Cal. Nov. 6, 2025) (holding that a similarly "bare-bones explanation does not contain reasons for the revocation of Petitioner's release" as to a pre-1995 Vietnamese immigrant).

Finally, ICE has not afforded Mr. Ngo a "prompt[]" "informal interview," at which he can have "an opportunity to respond to the reasons for revocation." 8 C.F.R. §§ 241.13(i)(3); 241.4(*l*)(1). It has yet to conduct an informal interview. *See* ECF No. 6 at 2; *id.* at Declaration of Jason Cole, ¶ 7. As Judge Schopler explained in a case when ICE *had* conducted an informal interview, but had a "29-day delay" between arrest and initial interview, it "violated the requirement to 'conduct an initial interview promptly.'" *Soryadvongsa*, 2025 WL 3126821 at *3.

2. Mr. Ngo need not show prejudice, although he can, because the regulations implement the core due process guarantees of notice and an opportunity to be heard while being detained.

The government's two remaining arguments on Mr. Ngo's regulatory claims—that Mr. Ngo must show prejudice, and that the regulations do not implement due process and protected liberty interests—also fail.

First, Mr. Ngo need not show prejudice from these regulatory claims. "[T]he 'norm' when ICE fails to conduct an 'informal interview promptly' is that 'courts across the country have ordered the release of individuals stemming from ICE's illegal detention." *Soryadvongsa*, 2025 WL 3125821 at *3 (quoting *KEO v. Woosley*, No. 4:25-CV-74-RGJ, 2025 WL 2553394, *6–*7 (W.D. Ky. Sept. 4, 2025)). "Especially in the context of civil detentions—when constitutional safeguards are at their zenith—this Court is unwilling to import such a prejudice analysis into regulations or binding caselaw that don't mention it." *Id.*

To flesh this point out, "[t]here are two types of regulations: (1) those that protect fundamental due process rights, and (2) and those that do not." *Martinez v. Barr*, 941 F.3d 907, 924 n.11 (9th Cir. 2019) (cleaned up). "A violation of the

first type of regulation . . . implicates due process concerns even without a prejudice inquiry." *Id.* (cleaned up). Here, "[t]here can be little argument that ICE's requirement that noncitizens be afforded an informal interview—arguably the most bare-bones form of an opportunity to be heard—derives from the fundamental constitutional guarantee of due process." *Ceesay v. Kurzdorfer*, 781 F. Supp. 3d 137, 165 n.26 (W.D.N.Y. May 2, 2025). No showing of prejudice is required.

Regardless, a violation of a regulation is prejudicial where, as here, "the merits" of an immigrant's case for relief "were never considered by the agency at all." *Arizmendi-Medina v. Garland*, 69 F.4th 1043, 1052 (9th Cir. 2023). Faced with that total deprivation, a petitioner need not point to the specific "evidence [he] would have presented to support [his] assertions" or make "any allegations as to what the petitioner or his witnesses might have said." *Id.* (cleaned up).

And Mr. Ngo could "present plausible scenarios in which the outcome of the proceedings would have been different if a more elaborate process were provided." *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 495 (9th Cir. 2007) (cleaned up). He would have had a very strong argument against re-detention had ICE given him notice and an opportunity to respond. Importantly, ICE is fully capable of trying to get a travel document while Mr. Ngo remained at liberty. Detaining him is therefore unnecessary. Mr. Ngo deserved a chance to make that case upon his re-detention. Because ICE did not make any of the proper findings, let alone give Mr. Ngo timely notice and a chance to contest them, he must be released.

Second, of course § 241.13(i) and § 241.4(l)(1) implement the basic due process protections of notice and an opportunity to be heard before being detained indefinitely. Their violation is an enforceable violation of a protected interest in being free from indefinite detention. "When someone's most basic right of freedom is taken away, that person is entitled to at least some minimal process;

otherwise, we all are at risk to be detained—and perhaps deported—because someone in the government thinks we are not supposed to be here." *Ceesay*, 781 F. Supp. 3d at 165.

In arguing otherwise, *see* ECF No. 6 at 12–13, the government "confuses [Mr. Ngo's] right to an order of supervision, which ICE indeed has discretion to grant or deny, with his right not to be detained without adequate—in fact, without *any*—process. The right to be free from detention can never be dismissed as discretionary." *Id.* (citing *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001)).

"When the INS published 8 C.F.R. § 241.4 on December 21, 2000, it explained that the regulation was intended to provide aliens procedural due process, stating that § 241.4 'has the procedural mechanisms that . . . courts have sustained against due process challenges.'" *Jimenez v. Cronen*, 317 F. Supp. 3d 626, 641 (D. Mass. 2018) (quoting Detention of Aliens Ordered Removed, 65 FR 80281-01). And "[s]ection 241.13(i) includes provisions modeled on § 241.4(1) to govern determinations to take an alien back into custody," Continued Detention of Aliens Subject to Final Orders of Removal, 66 FR 56967-01, meaning that it addresses the same due process concerns as 241.4(*l*).

"The procedures in § 241.4" and § 241.13 therefore "are not meant merely to facilitate internal agency housekeeping, but rather afford important and imperative procedural safeguards to detainees." *Jimenez*, 317 F. Supp. 3d at 642. Because the procedures in 8 C.F.R. §§ 241.4, 241.13 are "intended to provide due process to individuals in [Mr. Ngo's] position," *Santamaria Orellana v. Baker*, No. CV 25-1788-TDC, 2025 WL 2444087, *6 (D. Md. Aug. 25, 2025), they are enforceable.

Because the government failed to comply with core requirements of § 241.4 and § 241.13 when revoking Mr. Ngo's release, it should, "[l]ike many other district courts within this circuit," "find[] that these failures constitute a violation of Petitioner's due process rights and justif[y] his release." *Bui v. Warden of Otay*

*Mesa Detention Facility*, No. 25-cv-2111-JES, 2025 WL 2988356, *5 (S.D. Cal. Oct. 23, 2025).

**B. Claim Two: The government has not proved that there is a significant likelihood of removal in the reasonably foreseeable future under *Zadvydas* and § 1231.**

Next, the government provides insufficient evidence to meet its burden to show that Mr. Ngo will likely be removed to Vietnam in the reasonably foreseeable future.

1. The six-month grace period has passed, and Mr. Ngo provided good reason to believe his individual removal is not likely in the foreseeable future in light of ICE being unable to remove him up to ten prior times and unable to remove most pre-1995 Vietnamese immigrants under the still-effective 2020 MOU.

The government does not dispute that the six-month *Zadvydas* grace period has passed. ECF No. 6 at 9. As a result, Mr. Ngo's detention is "no longer presumptively reasonable." *Phan v. Warden of Otay Mesa Detention Facility*, No. 25-cv-2369-AJB-BLM, 2025 WL 3141205, *4 (S.D. Cal. Nov. 10, 2025).

The government does dispute that Mr. Ngo has provided "good reason" to doubt whether his removal is either significantly likely or likely to occur in the reasonably foreseeable future. *Zadvydas*, 533 U.S. at 701 (establishing the "good reason" standard); *see* ECF No. 8 at 8–10 (not mentioning the "good reason" standard, but arguing that Mr. Ngo has not shown there is no significant likelihood of removal in the reasonably foreseeable future).

In so doing, the government ignores the three good reasons Mr. Ngo provided in his petition: (1) ICE was unable to remove him in 1995 and 1996, and thus released him; (2) ICE has remained unable to remove him for the last three decades, including during the last five years under the operative memorandum of understanding between the United States and Vietnam governing pre-1995 Vietnamese arrivals, the 2020 MOU; and (3) ICE itself admitted in later stages of the *Trinh* litigation that, "generally," "'pre-1995 Vietnamese immigrants' . . . are not likely to be removed in the reasonably foreseeable future." *Trinh v. Homan*,

No. 18-cv-316-CJC-GJS, Dkt. No. 161 at 3 (C.D. Cal. Oct. 7, 2021) (establishing ICE policy for pre-1995 Vietnamese immigrants in a stipulated dismissal).

The burden has therefore shifted to the government to prove that there is a "significant likelihood of removal in the reasonably foreseeable future." *Zadvydas*, 533 U.S. at 701. That standard has a success element ("significant likelihood of removal") and a timing element ("in the reasonably foreseeable future"). The government meets neither.

2. The government provides insufficient evidence to support a "significant likelihood of removal" to Vietnam.

The government has not shown that Mr. Ngo's removal to Vietnam is "significant[ly] like[ly]." *Zadvydas*, 533 U.S. at 701.

Deportation Officer Cole notes that ICE removed 324 Vietnamese immigrants who came to the U.S. before 1995. ECF No. 6, Declaration of Jason Cole, ¶ 12. He does not mention how many more such immigrants are currently in the United States but have been unable to be deported. *Id.* For example, "'[i]f DHS submitted 350 requests and Vietnam issued travel documents for 328 individuals' then removal [would be] significantly likely," but "'if DHS submitted 3,500 requests and only 328 individuals received travel documents,'" then 'Respondents would not be able to meet their burden." *Hoac v. Becerra*, No. 25-cv-1740-DC-JDP, 2025 WL 1993771, *5 (E.D. Cal. July 16, 2025) (quoting *Nguyen v. Hyde*, 788 F. Supp. 3d 144, 151 (D. Mass. 2025)). Officer Cole also does not "clarify whether travel documents *issued* in FY2025 were also *requested* in FY 2025, or if they include requests made in previous fiscal years." *Nguyen v. Scott*, __ F. Supp. 3d. __, 2025 WL 2419288, *17 (W.D. Wash. 2025) (emphasis in original).

Regardless, courts have "demanded an individualized analysis" of why *this* person—Mr. Ngo—will likely be removed. *Id.*; *see, e.g.*, *Phan*, 2025 WL 3141205 at *4–*5 (granting habeas petition under *Zadvydas* because "evidence

that Respondents have successfully removed other [pre-1995] Vietnamese citizens is insufficient to demonstrate a significant likelihood that *Petitioner* will receive a travel document," and "Respondents do not cite any chance in circumstances or characteristics *specific to Petitioner*").

Because "[t]he government has not provided any evidence of [Vietnam's] eligibility criteria or why it believes Petitioner now meets it," and because the only individualized evidence indicates Vietnam has previously declined to provide travel documents to Mr. Ngo, the government's evidence is insufficient. *Nguyen*, 2025 WL 2419288 at *18.

Importantly, good faith efforts to secure a travel document do not themselves satisfy *Zadvydas*. In fact, the petitioner in *Zadvydas* appealed a "Fifth Circuit h[olding] [that] [the petitioner's] continued detention [was] lawful as long as good faith efforts to effectuate deportation continue and [the petitioner] failed to show that deportation will prove impossible." 533 U.S. at 702 (cleaned up). The Supreme Court reversed, finding that the Fifth Circuit's good-faith-efforts standard "demand[ed] more than our reading of the statute can bear." *Id.*

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

Here, then, "[w]hile the respondent asserts that [Mr. Ngo's] travel document requests" will be submitted and then will be pending, "this is insufficient. It is merely an assertion of good-faith efforts to secure removal; it

does not make removal likely in the reasonably foreseeable future." *Gilali v. Warden of McHenry Cnty.*, No. 19-CV-837, 2019 WL 5191251, at *5 (E.D. Wis. Oct. 15, 2019).

3. The government provides no evidence to support that any removal will occur "in the reasonably foreseeable future."

Additionally, even if ICE will eventually remove Mr. Ngo, the government provides little evidence that removal will happen "in the reasonably foreseeable future." *Zadvydas*, 533 U.S. at 701. Officer Cole provides no timetable for how long travel document requests like Mr. Ngo's typically take.

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

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

## IV. The remaining TRO factors decidedly favor Mr. Ngo.

This Court need not evaluate the other TRO factors—the Court may simply

grant the petition outright. But if the Court does decide to evaluate irreparable harm, the balance of harms, and the public interest, Mr. Ngo should prevail.

On the irreparable harm prong, "[i]t is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). And contrary to the government's arguments,[2] the Ninth Circuit has specifically recognized the "irreparable harms imposed on anyone subject to immigration detention." *Hernandez v. Sessions*, 872 F.3d 976, 995 (9th Cir. 2017). "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty" that the Fifth Amendment protects. *Zadvydas*, 533 U.S. at 690.

On the balance-of-equities/public-interest prong, the government is correct that there is a "public interest in prompt execution of removal orders." *Nken v. Holder*, 556 U.S. 418, 436 (2009). But that interest is diminished here because the government likely cannot remove Mr. Ngo in the reasonably foreseeable future, and even if it could, it is equally "well-established that 'our system does not permit agencies to act unlawfully even in pursuit of desirable ends.'" *Nguyen*, 2025 WL 2419288, at *28 (quoting *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 594 U.S. 758, 766 (2021)). It also "would not be equitable or in the public's interest to allow the [government] to violate the requirements of federal law" with respect to detention and re-detention. *Arizona Dream Act Coal. v.*

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[2] The government cites three cases to support the position that illegal immigration detention is not irreparable harm. ECF No. 6 at 15. All involved immigrants who were actively appealing to the BIA, but wanted a federal court to intervene before the appeal was done. *Reyes v. Wolf*, No. C20-0377JLR, 2021 WL 662659, at *1 (W.D. Wash. Feb. 19, 2021); *Cortez v. Nielsen*, 2019 WL 1508458 (N.D. Cal. Apr. 5, 2019); *Resendiz v. Holder*, 2012 WL 5451162. These courts indicated only that post-bond-hearing detention pending an ordinary BIA appeal, in which administrative exhaustion was available to the petitioner and being pursued, was not irreparable harm. *Id.* The government also cites one case for this proposition in which the court did grant a temporary restraining order ordering an immigration judge to reconsider a request for a bond hearing. *See Lopez Reyes v. Bonnar*, No. 18-cv-07429, 2018 WL 7474861, *10–11 (N.D. Cal. Dec. 24, 2018).

*Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014) (cleaned up).

## V. Conclusion

For all these reasons, this Court should grant the petition or enter a temporary restraining order and injunction. In either case, the Court should (1) order Mr. Ngo's immediate release; (2) prohibit Respondents from re-detaining Mr. Ngo unless and until Respondents obtain a travel document; and (3) prohibit Respondents from re-detaining Mr. Ngo without first following all regulatory procedures.

Respectfully submitted,

Dated: December 2, 2025

*s/ Jessie Agatstein*

Jessie Agatstein
Federal Defenders of San Diego, Inc.
Attorneys for Mr. Ngo
Email: Jessie_Agatstein@fd.org