

Kara Hartzler

Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101-5030
Telephone: (619) 234-8467
Facsimile: (619) 687-2666
kara_hartzler@fd.org

Attorneys for Mr. Phouthavong

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

BOUANGERN PHOUTTHAVONG,

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.

Civil Case No.: 26-cv-583-LL-DDL

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

INTRODUCTION

Having received the government's Return and exhibits, this Court should grant Mr. Phouthavong's petition. To do so, the Court need only acknowledge the government's admissions of its failure to comply with the regulations and follow the reasoning of recent decisions in this district and around the country.

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

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

Yet ICE did none of these things when it arrested Mr. Phouthavong on December 2, 2025. The government admits that it did not provide Mr. Phouthavong an informal interview under 8 C.F.R. § 241.13(i)(3). Dkt. 5 at 2, 5; Dkt. 5-1 at ¶ 8. And while it provided a Notice of Revocation of Release, this Notice did not give the reasons for the revocation because it only alleged there were "changed circumstances" without saying what these circumstances were. Dkt. 5-2, Exh. 1.

Second, this Court should grant the petition on Claim Two because the government provides no independent evidence to satisfy the success element ("a significant likelihood of removal") or timing element ("in the reasonably foreseeable future") of *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). Though Deportation Officer ("DO") Ramirez asserts that "ICE routinely obtains travel documents from the government of Laos," Dkt. 5-1 at ¶ 10, he does not give any statistics in support of this statement or say when Mr. Phouthavong will be removed. This Court should therefore grant the petition on either ground.

ARGUMENT

I. Mr. Phouthavong’s claims succeed on the merits.

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

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

ICE’s admitted regulatory violations alone are sufficient to grant the habeas petition or TRO. First, the government admits that ICE did not provide Mr. Phouthavong the mandatory interview the regulations require. Dkt. 5 at 2, 5; Dkt. 5-1 at ¶ 8. The government thus failed to provide this interview “promptly after his or her return to Service custody.” 8 C.F.R. §§ 241.4(l)(1). In *M.S.L. v. Bostock*, Civ. No. 6:25-cv-01204-AA, 2025 WL 2430267, at *11 (D. Or. Aug. 21, 2025), a district court recently granted a habeas petition because an informal interview given 27 days after petitioner was taken into ICE custody “cannot reasonably be construed as . . . prompt.” And in *Sayvongsas v. Noem*, 25-cv-2867-AGS-DEB (S.D. Cal. Oct. 31, 2025), Judge Schopler relied on this case and others to hold that a three-week delay was not “prompt.” So here, even if ICE were to provide an interview immediately, the two-month delay “cannot reasonably be construed as . . . prompt.” 2025 WL 2430267.

Second, the Notice of Revocation of Release simply states that this revocation was “based on a review of your official alien file and a determination that there are changed circumstances in your case.” Dkt. 5-2, Exhibit 1. But “[s]imply to say that circumstances had changed or there was a significant likelihood of removal in the foreseeable future is not enough.” *Sarail A. v. Bondi*, No. 25-CV-2144, 2025 WL 2533673, at *3 (D. Minn. Sept. 3, 2025). Rather, “Petitioner must be told *what* circumstances had changed or *why* there was now a

1 significant likelihood of removal in order to meaningfully respond to the reasons
 2 and submit evidence in opposition, as allowed under § 241.13(i)(3).” *Id.* By
 3 “identif[ying] the category—‘changed circumstances’—but fail[ing] to notify
 4 [Petitioner] of the reason—the circumstances that changed and created a
 5 significant likelihood of removal in the reasonably foreseeable future—[ICE]
 6 failed to follow the relevant regulation.” *Id.*

7 “When the INS published 8 C.F.R. § 241.4 on December 21, 2000, it
 8 explained that the regulation was intended to provide aliens procedural due
 9 process, stating that § 241.4 ‘has the procedural mechanisms that . . . courts have
 10 sustained against due process challenges.’” *Jimenez v. Cronen*, 317 F. Supp. 3d
 11 626, 641 (D. Mass. 2018) (quoting Detention of Aliens Ordered Removed, 65 FR
 12 80281-01). And “[s]ection 241.13(i) includes provisions modeled on § 241.4(I)
 13 to govern determinations to take an alien back into custody,” Continued Detention
 14 of Aliens Subject to Final Orders of Removal, 66 FR 56967-01, meaning that it
 15 addresses the same due process concerns as 241.4(I). “The procedures in § 241.4”
 16 and § 241.13 therefore “are not meant merely to facilitate internal agency
 17 housekeeping, but rather afford important and imperative procedural safeguards to
 18 detainees.” *Jimenez*, 317 F. Supp. 3d at 642. Because the procedures in 8 C.F.R.
 19 §§ 241.4, 241.13 are “intended to provide due process to individuals in [Mr.
 20 Phouthavong’s] position,” *Santamaria Orellana v. Baker*, No. CV 25-1788-TDC,
 21 2025 WL 2444087, *6 (D. Md. Aug. 25, 2025), they are enforceable.

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 insufficient assurances that Mr.
 26 Phouthavong will likely be removed to Laos in the reasonably foreseeable future.

27 The government appears to contend that the six-month grace period starts
 28 over every time ICE re-detains someone. Dkt. 5 at 4. “Courts . . . broadly agree”
 that this is not correct. *Diaz-Ortega v. Lund*, 2019 WL 6003485, at *7 n.6 (W.D.

1 La. Oct. 15, 2019), *report and recommendation adopted*, 2019 WL 6037220
2 (W.D. La. Nov. 13, 2019); *see also Sied v. Nielsen*, No. 17-CV-06785-LB, 2018
3 WL 1876907, at *6 (N.D. Cal. Apr. 19, 2018) (collecting cases); *Nguyen v. Scott*,
4 No. 2:25-CV-01398, 2025 WL 2419288, at *13 (W.D. Wash. Aug. 21, 2025).

5 But even a cursory review of § 1231(a)(1)(B) shows that that is not true.
6 The statute defines three, specific starting dates for the removal period, none of
7 which involve re-detention. *See Bailey v. Lynch*, No. CV 16-2600 (JLL), 2016
8 WL 5791407, at *2 (D.N.J. Oct. 3, 2016) (explaining this). The six-month grace
9 period has therefore ended, and so—contrary to the government’s claims—
10 Mr. Phouthavong need not rebut the “presumptively reasonable period of
11 detention.” Dkt. 5 at 3.

12 Because the six-month grace period has passed, this court moves on to the
13 burden-shifting framework. The government does not deny that Mr. Phouthavong
14 has provided “good reason” to doubt his reasonably foreseeable removal, thereby
15 forfeiting the issue. *See* Dkt. 5 at 4. *Moallin v. Cangemi*, 427 F. Supp. 2d 908, 928
16 (D. Minn. 2006). The burden therefore shifts to the government to prove that there
17 is a “significant likelihood of removal in the reasonably foreseeable future.”
18 *Zadvydas*, 533 U.S. at 701. That standard has a success element (“significant
19 likelihood of removal”) and a timing element (“in the reasonably foreseeable
20 future”).

21 For the reasons previously explained, the government has provided
22 insufficient assurances of either. DO Ramirez asserts that “ICE routinely obtains
23 travel documents from the government of Laos” but provides no statistics in
24 support of this. Dkt. 5-1 at ¶ 10. This declaration also does not say that the
25 government has a travel document for Mr. Phouthavong or when it will—only
26 that ICE “has the necessary identity documents” to obtain a travel document. Dkt.
27 5-1 at ¶ 10. Because these facts render the certainty of removal speculative, Mr.
28 Phouthavong therefore succeeds under *Zadvydas*, too.

1 **II. The remaining TRO factors decidedly favor Mr. Phouthavong.**

2 This Court need not evaluate the other factors related to a TRO—the Court
3 may simply grant the petition outright. But if the Court does decide to evaluate
4 irreparable harm and balance of harms/public interest, Mr. Phouthavong should
5 prevail.

6 On the irreparable harm prong, “[i]t is well established that the deprivation
7 of constitutional rights ‘unquestionably constitutes irreparable injury.’” *Melendres*
8 *v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). And contrary to the government’s
9 arguments, the Ninth Circuit has specifically recognized the “irreparable harms
10 imposed on anyone subject to immigration detention.” *Hernandez v. Sessions*, 872
11 F.3d 976, 995 (9th Cir. 2017). Furthermore, “[i]t is beyond dispute that Petitioner
12 would face irreparable harm from removal to a third country.” *Nguyen*, 2025 WL
13 2419288, at *26.

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

27 //

28 //

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 order Mr. Phouthavong's immediate release.

Respectfully submitted,

Dated: February 10, 2026

s/ Kara Hartzler

Kara Hartzler
Federal Defenders of San Diego, Inc.
Attorneys for Mr. Phouthavong
Email: kara.hartzler@fd.org