

ZANDRA L. LOPEZ
California State Bar No. 216567
FEDERAL DEFENDERS OF SAN DIEGO, INC.
225 Broadway, Suite 900
San Diego, California 92101-5030
Telephone: (619) 234-8467
Facsimile: (619) 687-2666
Zandra_Lopez@fd.org

Attorneys for Mr. Ahmadzai

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

TOFAN AHMADZAI,

Petitioner,

v.

MARKWAYNE MULLIN, Secretary of
the Department of Homeland Security, et
al.,

Respondents.

CASE NO.: 26-cv-2641-JAO-MSB

Traverse

[Civil Immigration Habeas,
28 U.S.C. § 2241]

TABLE OF CONTENTS

PAGE

I.	INTRODUCTION.....	1
II.	ARGUMENT	1
A.	This Court has jurisdiction to hear the petition.....	1
B.	Claim 1: The government’s Return confirms that ICE has no reason to think Mr. Ahmadzai can be removed in the reasonably foreseeable future.....	3
1.	The sixth month presumptive period has now expired.....	3
2.	It remains unknown whether there is a likelihood of removal and if removal is in the reasonably foreseeable future.....	4
C.	Claim 2: ICE may not remove Petitioner to a third country without adequate notice and an opportunity to be heard.....	5

1 **I. INTRODUCTION**

2 Mr. Ahmadzai has a final order of removal from over six months ago. The
 3 government concedes the United States does not recognize, nor does it have
 4 formal diplomatic relations with the Taliban. Although the United States made a
 5 request for travel authorization through an “intermediary foreign power,” there is
 6 no indication if authorization will be approved or when it will be granted. Return
 7 ECF No. 4-2 at ¶17. In fact, five days before the six-month grace period, all that is
 8 known is that the travel authorization to Afghanistan remains pending. *Id.* at ¶21.

9 Thus, the evidence before this Court is that there is no significant likelihood
 10 of removal in the reasonably foreseeable future. *Zadvydas v. Davis*, 533 U.S. 678,
 11 701 (2001). And if—despite all evidence to the contrary—ICE is able to remove
 12 Mr. Ahmadzai to a third country, ICE must at a minimum give him the process set
 13 forth in *D.V.D. v. U.S. Dep’t of Homeland Sec.*, No. CV 25-10676-BEM, 2025
 14 WL 1453640, at *1 (D. Mass. May 21, 2025). Twenty-four hours’ notice or less is
 15 not near enough to satisfy the Constitution. This Court should therefore grant this
 16 petition on both counts.

17 **II. ARGUMENT**

18 **A. This Court has jurisdiction to hear the petition.**

19 The government argues that 8 U.S.C. § 1252(g) divests this Court of
 20 jurisdiction over the petition. ECF No. 4 at 5-6.¹ Section 1252(g) does not bar
 21 review of “all claims arising from deportation proceedings.” *Reno v. Am.-Arab*
 22 *Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999). Instead, courts “have
 23 jurisdiction to decide a purely legal question that does not challenge the Attorney
 24 General’s discretionary authority.” *Ibarra-Perez v. United States*, 154 F.4th 989,
 25 996 (9th Cir. 2025) (cleaned up).

26
 27 ¹ The Return’s introduction also suggests that the Petition lacks merit because Mr.
 28 Ahmadzai is inadmissible. ECF No. 4 at 2. However, there is no legal argument
 supporting that assertion. Thus, Mr. Ahmadzai does not address it in its traverse.

1 In *Ibarra-Perez*, the Ninth Circuit squarely held that § 1252(g) does not
 2 prohibit immigrants from asserting a “right to meaningful notice and an
 3 opportunity to present a fear-based claim before [they] [are] removed,” *id.* at
 4 997²—the same claim that Petitioner raises here with respect to third-country
 5 removals. The Court reasoned that “§ 1252(g) does not prohibit challenges to
 6 unlawful practices merely because they are in some fashion connected to removal
 7 orders.” *Id.* Instead, 1252(g) is “limited . . . to actions challenging the Attorney
 8 General’s discretionary decisions to initiate proceedings, adjudicate cases, and
 9 execute removal orders.” *Arce v. United States*, 899 F.3d 796, 800 (9th Cir. 2018).
 10 It does not apply to arguments that the government “entirely lacked the authority,
 11 and therefore the discretion,” to carry out a particular action. *Id.* at 800. Thus,
 12 § 1252(g) applies to “discretionary decisions that [the Secretary] actually has the
 13 power to make, as compared to the violation of his mandatory duties.” *Ibarra-*
 14 *Perez*, 154 F.4th at 999.

15 The same logic applies to all of Petitioner’s claims, because he challenges
 16 only violations of ICE’s mandatory duties under statutes, regulations, and the
 17 Constitution. Accordingly, “[t]hough 8 U.S.C § 1252(g), precludes this Court from
 18 exercising jurisdiction over the executive’s decision to ‘commence proceedings,
 19 adjudicate cases, or execute removal orders against any alien,’ this Court has habeas
 20 jurisdiction over the issues raised here, namely the lawfulness of [Petitioner]
 21 continued detention and the process required in relation to third country removal.”
 22 *Y.T.D. v. Andrews*, 2025 WL 2675760, *5 (E.D. Cal. Sept. 18, 2025). Many courts
 23 agree. *See, e.g., Kong v. United States*, 62 F.4th 608, 617 (1st Cir. 2023) (“§ 1252(g)

24
 25
 26 ² 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
 Petitioner 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 does not bar judicial review of Kong’s challenge to the lawfulness of his detention,”
 2 including ICE’s “fail[ure] to abide by its own regulations”); *Cardoso v. Reno*, 216
 3 F.3d 512, 516 (5th Cir. 2000) (“[S]ection 1252(g) does not bar courts from
 4 reviewing an alien detention order[.]”); *Parra v. Perryman*, 172 F.3d 954, 957 (7th
 5 Cir. 1999) (1252(g) did not apply to a “claim concern[ing] detention”); *J.R. v.*
 6 *Bostock*, No. 2:25-CV-01161-JNW, 2025 WL 1810210, at *3 (W.D. Wash. June
 7 30, 2025) (1252(g) did not apply to claims that ICE was “failing to carry out non-
 8 discretionary statutory duties and provide due process”); *D.V.D. v. U.S. Dep’t of*
 9 *Homeland Sec.*, 778 F. Supp. 3d 355, 377–78 (D. Mass. 2025) (1252(g) did not bar
 10 review of “the purely legal question of whether the Constitution and relevant
 11 statutes require notice and an opportunity to be heard prior to removal of an alien
 12 to a third country”).

13 **B. Claim 1: The government’s Return confirms that ICE has no**
 14 **reason to think Mr. Ahmadzai can be removed in the reasonably**
 15 **foreseeable future.**

16 **1. The sixth month presumptive period has now expired.**

17 The government argues that the habeas is premature. Return ECF No. 2, 3-
 18 4. It cites cases where the detention is not close to reaching six months between
 19 the final order of removal and the district court’s habeas decision. *Khalilova v.*
 20 *Smith*, No. 25-CV-2140 JLS (DDL), 2025 WL 3089522, at *3 (S.D. Cal. Nov. 5,
 21 2025) (denying where the petitioner detained for approximately three months at
 22 the time of the district court’s decision); *Muradyan v. Warden, Otay Mesa Det.*
 23 *Ctr.*, No. 3:26-CV-00063-CAB-AHG, 2026 WL 184206, at *1 (S.D. Cal. Jan. 23,
 24 2026) (denying where the petitioner detained for less than four months at the time
 25 of the district court’s decision); *Ghamelian v. Baker*, No. CV SAG-25-02106,
 26 2025 WL 2049981, at *2 (D. Md. July 22, 2025) (denying where petitioner
 27 detained for less than a month at the time of decision); *Guerra-Castro v. Parra*,
 28 No. 1:25-CV-22487, 2025 WL 1984300, at *1 (S.D. Fla. July 17, 2025) (denying
 where petitioner detained for two months at the time of decision).

1 That is not applicable here. The government concedes that the six-month
 2 period ended on May 10, 2026. ECF No. 4 at 3. The six-month period has passed
 3 because *Zadvydas* grace period is linked to the date the final order of removal is
 4 issued. It lasts for “*six months* after a final order of removal—that is, *three months*
 5 after the statutory removal period has ended.” *Kim Ho Ma v. Ashcroft*, 257 F.3d
 6 1095, 1102 n.5 (9th Cir. 2001). Indeed, the statute defining the beginning of the
 7 removal period is linked to the latest of three dates, all of which relevant here are
 8 tied to when the removal order is issued. 8 U.S.C. § 1231(a)(1)(B).³

9 Thus, at this point the six-month grace period has lapsed and the
 10 government cannot establish that there is a significant likelihood of removal in the
 11 reasonably foreseeable future.

12 **2. It remains unknown whether there is a likelihood of**
 13 **removal and if removal is in the reasonably foreseeable**
 14 **future.**

15 Mr. Ahmadzai must be released under *Zadvydas v. Davis*, because there is
 16 “no significant likelihood of removal in the reasonably foreseeable future.” 533
 U.S. 678, 701 (2001).

17 The government does not dispute that removals to Afghanistan are difficult.
 18 See Petition 1 at 10 (citing *Samir v. Wolf*, No. 25-CV-01397, 2026 WL 817240, at
 19 *2 (W.D. La. Mar. 2, 2026) (finding that Afghanistan refuses to cooperate with
 20 the United States and is likely not “even accepting the return of Afghan nationals
 21 from the United States.”). As noted by the deportation officer in this case, the
 22 United States does not recognize, nor does it have formal diplomatic relations
 23 with the Taliban. Return ECF No. 4-2 at ¶17. Although the Mr. Ahmadzai has a
 24

25 ³ Those dates are, specifically, (1) “[t]he date the order of removal becomes
 26 administratively final;” (2) “[i]f the removal order is judicially reviewed and if a
 27 court orders a stay of the removal of the alien, the date of the court’s final order;”
 28 or (3) “[i]f the alien is detained or confined (except under an immigration
 process), the date the alien is released from detention or confinement.” 8 USC
 § 1231(a)(1)(B).

1 passport, the United States, six months after the order of removal, has not yet
 2 been able to obtain travel documents. *Id.* at ¶ 21. All that has happened is that the
 3 United States has requested travel authorization through an “intermediary foreign
 4 power” but there is no indication if authorization will be approved or when it will
 5 be granted. *Id.* at ¶17.

6 At most, the government can only say at this point that it is attempting to
 7 obtain the travel authorization. But good faith efforts without more are not enough
 8 under *Zadvydas*. 533 U.S. at 702. Thus, there is no significant likelihood of
 9 removal in the reasonably foreseeable future. For all of these reasons, Mr.
 10 Ahmadzai must be released.

11 **C. Claim 2: ICE may not remove Petitioner to a third country**
 12 **without adequate notice and an opportunity to be heard.**

13 The record therefore reflects that Mr. Ahmadzai will not be removed to a
 14 third country in the reasonably foreseeable future. But ICE would remove him to
 15 a third country if it could, and something could unexpectedly change to make that
 16 feasible. To protect against that possibility, this Court should require the
 17 government to provide the notice set forth in *D.V.D. v. U.S. Dep’t of Homeland*
 18 *Sec.*, No. CV 25-10676-BEM, 2025 WL 1453640, at *1 (D. Mass. May 21, 2025),
 19 before removing Mr. Ahmadzai to any other third country. The government’s
 20 three arguments to the contrary are meritless.

21 *First*, the Supreme Court’s decision in *D.V.D.* does not affect this Court’s
 22 authority to order injunctive relief in this individual case. In *D.V.D.*, the
 23 government sought a stay based on procedural arguments applicable only to class
 24 actions. *Dep’t of Homeland Sec. v. D.V.D.*, 145 S. Ct. 2153, 2160 (2025)
 25 (Sotomayor, J., dissenting). But “even if the Government [was] correct that
 26 classwide relief was impermissible” in *D.V.D.*, Respondents still “remain[]
 27 obligated to comply with orders enjoining [their] conduct with respect to
 28 individual plaintiffs” like Mr. Ahmadzai. *Id.* Thus, the Supreme Court’s decision

1 does not override this Court’s authority to grant individual injunctive relief. *See*
2 *Nguyen v. Scott*, No. 2:25-CV-01398, 2025 WL 2419288, at *20–23 (W.D. Wash.
3 Aug. 21, 2025).

4 *Second*, Mr. Ahmadzai can seek this relief in this habeas petition despite
5 the pending class action. The Ninth Circuit held as much in analogous
6 circumstances in *Pride v. Correa*, which permitted a detained person to
7 individually challenge his own inadequate medical care despite a pending class
8 action challenging medical care at the facility. 719 F.3d 1130, 1137 (9th Cir.
9 2013). The Ninth Circuit reasoned that “[i]ndividual claims for injunctive relief
10 related to medical treatment are discrete from the claims for systemic reform
11 addressed in” a class action. *Id.* “Consequently, where an inmate brings an
12 independent claim for injunctive relief solely on his own behalf for medical care
13 that relates to him alone, there is no duplication of claims or concurrent
14 litigation.” *Id.* Otherwise, individual plaintiffs “would be powerless to petition the
15 courts for redress of the violation until” a class action, which can take years to
16 finish, “has been fully resolved.” *Id.* The Court therefore rejected the contention
17 that “an individual claim for injunctive relief may be delayed because a pending
18 class action seeks systemic reform relating to the same general subject matter.” *Id.*

19 So too here. Mr. Ahmadzai brings individual claims related to him alone,
20 rather than asking for the systemic reforms sought in *D.V.D.* And per the
21 government’s arguments in *D.V.D.*, these claims must be brought on an individual
22 basis; they cannot be brought in a class action. The government’s position
23 therefore would bar Mr. Ahmadzai from seeking relief individually, even while
24 the government argues in *D.V.D.* that he cannot get that relief as part of a class.
25 This Court should reject that “heads, I win; tails, you lose” reasoning. Under
26 *Plata*, “[t]he class certification order in *D.V.D.* does not prevent this Court from
27 adjudicating Petitioner’s claims regarding third-country removal.” *Nguyen v.*
28 *Scott*, 796 F. Supp. 3d 703, 730 (W.D. Wash. 2025).

Third, 24 hours' notice is not near enough to satisfy due process. Mr. Ahmadzai may not even have heard of the third country to which ICE intends to deport him, let alone have extensive information about the dangers he could face there. He will need time to research the country conditions before he can make a fair, intelligent decision about whether he fears removal. And if he does fear removal, but ICE does not consider his fear reasonable, he will need time to obtain an attorney and file a motion to reopen. That is why the court in *D.V.D.* laid out a two-step timeline for receiving notice about third countries: Petitioners need 10 days to decide whether to raise a fear-based claim and, if ICE decides that they do not have a reasonable fear, an additional 15 days to move to reopen.

D.V.D. v. U.S. Dep't of Homeland Sec., No. CV 25-10676-BEM, 2025 WL 1453640, at *1 (D. Mass. May 21, 2025). This Court should follow suit.

Respectfully submitted,

Dated: May 12, 2026

s/ Zandra L. Lopez

Zandra L. Lopez

Federal Defenders of San Diego, Inc.

Attorneys for Petitioner

Email: Zandra Lopez @fd.org