

1 ADAM GORDON
United States Attorney
2 KIM A. C. GREGG
Assistant U.S. Attorney
3 California Bar No. 318764
Office of the U.S. Attorney
4 880 Front Street, Room 6293
San Diego, CA 92101-8893
5 Telephone: (619) 546-8437
Email: Kim.Gregg@usdoj.gov

6 Attorneys for Respondents

7
8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 NISAR AHMAD FANA,

11 Petitioner,

12 v.

13 KRISTI NOEM, Secretary of the
14 Department of Homeland Security, et al.,

15 Respondents.

Case No.: 26-cv-0504-DMS-MMP

**RETURN TO PETITION FOR
WRIT OF HABEAS CORPUS**

16 **I. INTRODUCTION**

17 Petitioner claims he is entitled to immediate release under *Zavydas v. Davis*, 533
18 U.S. 678 (2001) because he has been in post-final order detention for six months and
19 two weeks and has not yet been removed from the United States. The Supreme Court
20 made clear, however, that its holding “does not mean that every alien not removed must
21 be released after six months.” *Zadvydas*, 533 U.S. at 701. And contrary to Petitioner’s
22 suggestion that Immigration and Customs Enforcement (ICE) has made no progress in
23 effectuating his removal, ICE has submitted a travel document request for Petitioner’s
24 removal to France, and the request is pending action by the French government.
25 Petitioner has offered no reason why France would refuse to accept him. Because the
26 record does not support a finding that there is no significant likelihood of removal in
27 the reasonably foreseeable future at this juncture, Respondents respectfully ask the
28 Court to deny the habeas petition.

1 **II. BACKGROUND**

2 Petitioner is a native and citizen of Afghanistan, who entered the United States
3 on December 18, 2024, and was thereafter booked into Immigration and Customs
4 Enforcement (ICE) custody and processed for expedited removal. *See* Declaration of
5 Concepcion Arredondo (“Arredondo Decl.”) at ¶¶ 4–5. At the time, ICE queries showed
6 that Petitioner holds an Afghanistan and a French passport. *See* Exh. 1 at 4.¹ After
7 expressing a fear of return to Afghanistan and receiving a positive credible fear
8 determination by a United States Citizenship and Services asylum officer, Petitioner
9 was served a Notice to Appear and placed in removal proceedings before an
10 Immigration Judge (IJ) on January 29, 2025. *See id.* at ¶¶ 6–7; Exh. 2 at 2.

11 On July 14, 2025, the IJ denied Petitioner’s application for asylum, withholding
12 of removal, and protection under the Convention Against Torture, and ordered him
13 removed to France (French Guiana), and in the alternative, to Afghanistan. *See* Exh. 3.
14 Petitioner and the Department of Homeland Security waived appeal of the decision. *See*
15 *id.* Since Petitioner’s order of removal, ICE has worked as expeditiously as possible to
16 execute his removal to France. *See* Arredondo Decl. at ¶ 10. After gathering and
17 finalizing the information needed to submit Petitioner’s travel document, the San Diego
18 Enforcement and Operations (ERO) sent the request to its Removal and International
19 Operations (RIO) division in Washington D.C. on September 8, 2025. *See id.* at ¶ 11.

20 The San Diego ERO has since sought regular updates from RIO and the French
21 Consulate about the travel document request. *See id.* at ¶¶ 12–14. “On January 21, 2026,
22 the French Consulate advised ICE that the travel document request was pending
23 authorization from their administration.” *Id.* at ¶ 15. Once the French government issues
24 the travel document, Petitioner will be promptly removed to France. *See id.* at ¶ 16.

25
26
27 ¹ The attached exhibits are true copies, with redactions for private information, of
28 documents obtained from ICE counsel. The pinpoint page citations refer to the
ECF-generated page numbers at the top of each filing.

III. ARGUMENT

1
2 “Section 241(a) of the Immigration and Nationality Act (INA), codified at 8
3 U.S.C. § 1231(a), authorizes the detention of noncitizens who have been ordered
4 removed from the United States.” *Johnson v. Arteaga-Martinez*, 596 U.S. 573, 575
5 (2022). The INA provides that an alien ordered removed must be detained for 90 days
6 pending the government’s efforts to secure the alien’s removal through negotiations
7 with foreign governments. *See* 8 U.S.C. § 1231(a)(2) (the Attorney General “shall
8 detain” the alien during the 90-day removal period under subsection (a)(1)).

9 Section 1231(a)(6) “authorizes further detention if the Government fails to
10 remove the alien during those 90 days.” *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001).
11 Detention authority under this statute, however, is limited to “a period reasonably
12 necessary to bring about the alien’s removal from the United States” and “does not
13 permit indefinite detention.” *Id.* at 689. The Supreme Court has held that a six-month
14 period of post-removal detention constitutes a “presumptively reasonable period of
15 detention.” *Id.* at 701. Release is not mandated after the expiration of the six-month
16 period unless “there is no significant likelihood of removal in the reasonably foreseeable
17 future.” *Id.*

18 Here, Petitioner is subject to a final, executable order of removal as of July 14,
19 2025, which means he has no right to remain in the United States. *See* Exh. 3; 8 C.F.R.
20 § 1241.1. He has been in detention for a little over six months since the order became
21 final, but the “6-month presumption, of course, does not mean that every alien not
22 removed must be released after six months.” *Zadvydas*, 533 U.S. at 701. “To the
23 contrary, an alien may be held in confinement until it has been determined that there is
24 no significant likelihood of removal in the reasonably foreseeable future.” *Id.*

25 Petitioner has offered no reason why he is unlikely to or cannot be removed to
26 either France or Afghanistan. His petition rests solely on the passage of the six-month
27 *Zadvydas* period. The mere passage of time, however, is not enough to meet his burden
28 to show a “good reason to believe that there is no significant likelihood of removal in

1 the reasonably foreseeable future.” *Id.*; see *Beckford v. Lynch*, 168 F. Supp. 3d 533,
2 539–40 (W.D.N.Y. 2016) (collecting cases where district courts “have found the habeas
3 petitioner’s assertion as to the unforeseeability of removal, supported only by the mere
4 passage of time, insufficient to meet the petitioner’s initial burden to demonstrate no
5 significant likelihood of removal under the Supreme Court’s holding in *Zadvydas*.”).

6 Even if Petitioner’s showing was sufficient, the government has rebutted it. *See*
7 *Zadvydas*, 533 U.S. at 701. Since Petitioner’s removal order became final, ICE has
8 worked as expeditiously as possible to execute his removal to France. After gathering
9 and finalizing the appropriate documents and biographical information to complete
10 Petitioner’s travel document request,² the San Diego ERO submitted the request to RIO
11 for review and forwarding to the French Consulate on September 8, 2025. *See*
12 *Arredondo Decl.* at ¶ 11. The San Diego ERO has since regularly followed up with RIO
13 and the French Consulate about Petitioner’s travel document request to ensure it is
14 processed as quickly as possible. *See id.* at ¶¶ 12–14. And both RIO and the French
15 Consulate have assured that the request is under active consideration. *See id.* at ¶¶ 13,
16 15. At this time, ICE is only awaiting authorization from the French government, and
17 once it obtains Petitioner’s travel document, it will promptly remove Petitioner to
18 France. *See id.* at ¶¶ 15–16.

19 This is not a case where the French government has previously refused to accept
20 Petitioner into its country or has not historically cooperated with the United States.
21 Petitioner has legal status in France, and there is no evidence that the French
22 government would decline to honor the status it conferred on Petitioner and deny him
23 authorization to return. *See Exh. 1* at 4 (explaining that Petitioner “holds a French
24 passport”). And while Petitioner argues that his removal is taking too long, *Zadvydas*
25 does not guarantee that he would be removed within six months. *See* 533 U.S. at 701
26

27 ² The record indicates that Petitioner had used different dates of birth for identification
28 purposes, necessarily requiring ICE to verify the correct one. *See Exh. 1* at 4.

1 (“This 6-month presumption, of course, does not mean that every alien not removed
2 must be released after six months.”). The Supreme Court was clear that the Constitution
3 prevents only “indefinite” or “potentially permanent” detention. *Id.* at 696, 699. With
4 detention barely over the six-month mark, a viable travel document request pending,
5 and no indication that France would refuse Petitioner’s return, this record does not
6 support a finding that there is no significant likelihood of Petitioner’s removal in the
7 reasonably foreseeable future. *See id.* at 701; *Prieto-Romero v. Clark*, 534 F.3d 1053,
8 1063 (9th Cir. 2008) (explaining that a showing of “no significant likelihood of removal
9 in the reasonably foreseeable future” under *Zadvydas* would include where “no country
10 would accept the deportees,” “the United States lacked an extradition treaty with [the]
11 receiving countries,” or the government is no longer involved in repatriation
12 negotiations with the country); *Diouf v. Mukasey*, 542 F. 3d 1222, 1233 (9th Cir. 2008)
13 (rejecting the petitioner’s *Zadvydas* claim, explaining: “There is no evidence, for
14 example, that [the designated country] would refuse to accept him, or that his removal
15 is barred by our own laws.”).

16 In sum, ICE has taken the exact steps it needs to take to ensure its removal efforts
17 bear fruit, there is no evidence that the French government would not authorize
18 Petitioner’s return, and the period of post-removal order confinement passed the
19 six-month mark only recently. *Zadvydas* illustrated that in these cases, the “reasonably
20 foreseeable future” showing that the government must meet is less exacting than it
21 would be if the detention was well beyond the six-month period. *See* 533 U.S. at 701;
22 *Alexander v. Attorney General U.S.*, 495 F. App’x 274, 276-77 (3d Cir. 2012) (“[A]n
23 inversely proportional relationship is at play: the longer an alien is detained, the less he
24 must put forward to obtain relief.”); *Hassoun v. Sessions*, No. 18-CV-586-FPG, 2019
25 WL 78984, at *4 (W.D.N.Y. Jan. 2, 2019) (“In effect, the parties’ respective burdens
26 shift as the length of detention increases.”). Thus, it would be premature to conclude
27 that there is no significant likelihood of removal in the reasonably foreseeable future
28 before permitting ICE an opportunity to complete the diligent efforts it has taken to

1 effect Petitioner's removal. Evidence of progress, even slow progress, in negotiating a
2 petitioner's repatriation will satisfy *Zadvydas* until the petitioner's detention grows
3 unreasonably lengthy. *See Kim v. Ashcroft*, Case No. 02cv1524-J-LAB, ECF No. 25 at
4 8 (S.D. Cal. June 2, 2003) (finding that petitioner's one year and four-month detention
5 does not violate *Zadvydas* given respondent's production of evidence showing
6 governments' negotiations are in progress and there is reason to believe that removal is
7 likely in the foreseeable future); *see Sereke v. DHS*, Case No. 19-cv-1250-WQH-AGS,
8 ECF No. 5 at 5 (S.D. Cal. Aug. 15, 2019) ("the record at this stage in the litigation does
9 not support a finding that there is no significant likelihood of Petitioner's removal in
10 the reasonably foreseeable future."); *Marquez v. Wolf*, Case No. 20-cv-1769-WQH-
11 BLM, 2020 WL 6044080 at *3 (denying petition because "Respondents have set forth
12 evidence that demonstrates progress and the reasons for the delay in Petitioner's
13 removal").

14 Given ICE's diligent efforts to obtain Petitioner's travel document and there
15 being no evidence that the French government would refuse to issue one, the record
16 does not support a finding that there is no significant likelihood of removal in the
17 reasonably foreseeable future. *See Zadvydas*, 533 U.S. at 701. Because *Zadvydas* does
18 not entitle Petitioner's release at this time, Respondents ask the Court to deny his habeas
19 petition.

20 Petitioner also requests a permanent injunction regulating the terms under which
21 he may be detained in the future or removed to a country other than France or
22 Afghanistan.³ The Court should deny the claim because ICE is removing Petitioner to
23 France, not to a third country. *See Arredondo Decl.* at ¶ 9. Thus, the claim presents no
24

25 ³ Respondents note that Petitioner's challenge to the July 9, 2025 ICE memo is subject
26 to ongoing litigation, with the Supreme Court staying an injunction imposed by a district
27 court ordering the government to provide notice and an opportunity to be heard like that
28 requested here. *See Dep't of Homeland Sec. v. D.V.D.*, 145 S. Ct. 2153 (2025). Given
the Supreme Court's reversal of that injunction, Respondents' position is that
imposition of a similar injunction would be reversed here.

1 live case or controversy, and in any event, exceeds the scope of relief available in
2 habeas. *See Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir.
3 2000) (“Our role is neither to issue advisory opinions nor to declare rights in
4 hypothetical cases, but to adjudicate live cases or controversies consistent with the
5 powers granted the judiciary in Article III of the Constitution.”); *see also Mora*
6 *Gutierrez v. Noem et al.*, Case No. 26-cv-112-RSH-JLBB, ECF No. 6 at 3 (S.D. Cal.
7 Jan. 16, 2026) (Huie, J.) (denying a similar request for “a permanent injunction
8 regulating the terms under which Petitioner may be detained in the future or removed
9 to a country other than Cuba” because “it exceeds the scope of relief available to
10 Petitioner on his habeas petition.”).

11 **IV. IV. CONCLUSION**

12 For the reasons stated herein, Respondents respectfully request the Court to deny
13 the habeas petition.

14 DATED: February 4, 2026

ADAM GORDON
United States Attorney

15
16 *s/ Kim A. C. Gregg*
17 KIM A. C. GREGG
Assistant United States Attorney

18
19 Attorneys for Respondents
20
21
22
23
24
25
26
27
28