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

NISAR AHMAD FANA,

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, JEREMY CASEY, Warden at Imperial Regional Detention Center,

Respondents.

CIVIL CASE NO.: 26-cv-504-DMS

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

This Court should grant Mr. Fana's petition on both grounds. The government now reveals that a travel document request has been pending with the French government for the last five months, with no assurances of issuance. And if ICE chooses instead to remove Mr. Fana to a third country, ICE must at a minimum give him the process set forth in *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).

1 Twenty-four hours' notice is not near enough to satisfy the Constitution. This
2 Court should therefore grant this petition on both counts.

3 **ARGUMENT**

4 **I. Count 1: The government does not prove that Mr. Fana can be removed**
5 **in the reasonably foreseeable future.**

6 Mr. Fana must be released under *Zadvydas v. Davis*, because there is "no
7 significant likelihood of removal in the reasonably foreseeable future." 533 U.S.
8 678, 701 (2001). The government does not deny that Mr. Fana has been in custody
9 for nearly seven months, meaning that the government has the burden to prove he
10 can be removed.

11 The government has not met that burden. Deportation Officer ("DO")
12 Arredondo reveals that Mr. Fana's travel document request has been pending with
13 the French government for over five months. Doc. 4-4 at ¶ 11. Any time ICE
14 requests updates, ICE and the French consulate just say that the request is pending.
15 *Id.* at ¶¶ 12–15. No one has provided any assurances that a travel document will
16 ever be issued, let alone when. *Id.* Nor does the government give any explanation
17 for the delay, or provide any evidence about how frequently France accepts for
18 removal people who are not French citizens. If Mr. Fana had a valid passport and a
19 clear right to enter and reside in France, as the government claims, why would it
20 take France almost an entire *Zadvydas* grace period to let him into the country? The
21 government does not even try to answer that question.

22 All told, then, the government relies almost entirely on the bare fact that it
23 has submitted a travel document request to the French government. But good faith
24 efforts to secure a travel document are not enough. The petitioner in *Zadvydas*
25 appealed a "Fifth Circuit h[olding] [that] [the petitioner's] continued detention
26 [was] lawful as long as good faith efforts to effectuate deportation continue and [the
27 petitioner] failed to show that deportation will prove impossible." 533 U.S. at 702
28 (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. Fana's] travel document requests" with France were lodged, "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).

The lack of timing evidence independently justifies release. "[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. Fana] 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).

With scant evidence that Mr. Fana will be removed to France, or when, the government has not met its burden, and this Court must grant the petition.

## II. Count 2: Twenty-four hours' notice before third-country removal is not sufficient for due process.

This Court should also prohibit ICE from removing Mr. Fana to a third country without adequate notice. The government does not try to defend ICE's third-country removal policy on the merits. Instead, the government says that a third-country removal challenge is nonjusticiable under Article III because ICE professes no current plans to remove Mr. Fana to a third country.

But "[t]here, so to speak, lies the rub." *D.V.D. v. U.S. Dep't of Homeland Sec.*, 778 F. Supp. 3d 355, 389 n.44 (D. Mass. 2025). "[A]ccording to [Respondents], an individual must await notice of removal before his claim is ripe[.]" *Id.* But under ICE's policy, "there is no notice" for certain removals and inadequate notice for others. *Id.* And if Mr. Fana "is removed" before he can raise this challenge, Respondents will then argue that "there is no jurisdiction" to bring him back to the United States. *Id.*

This Court need not adopt that Kafkaesque view. The government has not denied that "the default procedural structure without an injunction" is "set forth in DHS's March 30 and July 9, 2025 policy memoranda," which provide for third-country removal with little or no notice. *Y.T.D. v. Andrews*, No. 1:25-CV-01100 JLT SKO, 2025 WL 2675760, at *5 (E.D. Cal. Sept. 18, 2025). And Mr. Fana has "point[ed] to numerous examples of cases involving individuals who DHS has attempted to remove to third countries with little or no notice or opportunity to be heard." *Id.*; *see* Doc. 1 at 15-17. "On balance," then, "there is a sufficiently imminent risk that [Mr. Phan] will be subjected to improper process in relation to any third country removal to warrant imposition of an injunction requiring additional process." *Y.T.D.*, 2025 WL 2675760, at *11.

## III. Section 1252(g) does not deprive this Court of jurisdiction on any issue in this petition.

Finally, § 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).

"[Section] 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 discretionary decisions to initiate proceedings, adjudicate cases, and execute removal orders." *Arce v. United States*, 899 F.3d 796, 800 (9th Cir. 2018). It 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. Thus, § 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 all of Mr. Fana's claims, because he challenges only violations of ICE's mandatory duties under statutes, regulations, and the Constitution. Accordingly, "[t]hough 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. Fana's] continued detention and the process required in relation to third country removal." *Y.T.D.*, 2025 WL 2675760, at *5. Many courts agree. *See, e.g.*, *Kong*, 62 F.4th at 617 ("§ 1252(g) does not bar judicial review of Kong's challenge to the lawfulness of his detention," including ICE's "fail[ure] to abide by its own regulations"); *Cardoso v. Reno*, 216 F.3d 512, 516 (5th Cir. 2000) ("[S]ection 1252(g) does not

bar courts from reviewing an alien detention order[.]"); *Parra v. Perryman*, 172 F.3d 954, 957 (7th Cir. 1999) (1252(g) did not apply to a "claim concern[ing] detention"); *J.R. v. Bostock*, No. 2:25-CV-01161-JNW, 2025 WL 1810210, at *3 (W.D. Wash. June 30, 2025) (1252(g) did not apply to claims that ICE was "failing to carry out non-discretionary statutory duties and provide due process"); *D.V.D. v. U.S. Dep't of Homeland Sec.*, 778 F. Supp. 3d 355, 377–78 (D. Mass. 2025) (1252(g) did not bar review of "the purely legal question of whether the Constitution and relevant statutes require notice and an opportunity to be heard prior to removal of an alien to a third country").

Respectfully submitted,

Dated: February 9, 2026

*s/ Katie Hurrelbrink*
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