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

12 SAILESH SUBEDI,

CIVIL CASE NO.:

13 Petitioner,

14 v.

15 KRISTI NOEM, Secretary of the
 16 Department of Homeland Security,
 17 PAMELA JO BONDI, Attorney General,
 18 TODD M. LYONS, Acting Director,
 19 Immigration and Customs Enforcement,
 20 JESUS ROCHA, Acting Field Office
 Director, San Diego Field Office,
 JEREMY CASEY, Warden at Imperial
 Regional Detention Center,

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

Respondents.

21 This Court should grant Mr. Subedi’s petition on both grounds. The
 22 government concedes that ICE currently has not identified any third country to
 23 which Mr. Subedi can be removed, meaning that the government cannot meet its
 24 burden under *Zadvydas*. And if—despite all evidence to the contrary—ICE is able
 25 to remove Mr. Subedi to a third country, ICE must at a minimum give him the
 26 process set forth in *D.V.D. v. U.S. Dep’t of Homeland Sec.*, No. CV 25-10676-
 27 BEM, 2025 WL 1453640, at *1 (D. Mass. May 21, 2025). Twenty-four hours’
 28

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

3 **ARGUMENT**

4 **I. Count 1: The government’s Return confirms that ICE has no reason to**
5 **think Mr. Subedi can be removed in the reasonably foreseeable future.**

6 Mr. Subedi 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. Subedi has been in
9 custody for six months, meaning that the government has the burden to prove he
10 can be removed. But the government has not begun to do so. Deportation Officer
11 (“DO”) Vasquez admits that ICE has not even identified a third country that might
12 possibly take Mr. Subedi, let alone asked any country take him. Doc. 4-1 at ¶¶ 9–
13 12. In fact, though DO Vasquez attests to twice requesting updates from ERO
14 Removal International Operations Division (HQRIO), the unit charged with third-
15 country removals, there is no evidence the HQRIO even responded to those
16 messages. *Id.*

17 Finally, ICE’s complete failure to identify a plausible path to removal is
18 especially damning in light of the undisputed empirical evidence in the petition,
19 which establishes that “alternative-country removal is rare.” *Johnson v. Guzman-*
20 *Chavez*, 594 U.S. 523, 537 (2021).

21 Furthermore, DO Vasquez does not provide any evidence about how long a
22 third-country removal might take—no statistics, no anecdotes, no guesses, no
23 nothing. That, too, is fatal. “[D]etention may not be justified on the basis that
24 removal to a particular country is likely *at some point* in the future; *Zadvydas*
25 permits continued detention only insofar as removal is likely in the *reasonably*
26 *foreseeable* future.” *Hassoun*, 2019 WL 78984, at *6. “The government’s active
27 efforts to obtain travel documents from the Embassy are not enough to demonstrate
28 a likelihood of removal in the reasonably foreseeable future where the record before

1 the Court contains no information to suggest a timeline on which such documents
2 will actually be issued.” *Rual v. Barr*, No. 6:20-CV-06215 EAW, 2020 WL
3 3972319, at *4 (W.D.N.Y. July 14, 2020). “[I]f DHS has no idea of when it might
4 reasonably expect [Mr. Subedi] to be repatriated, this Court certainly cannot
5 conclude that his removal is likely to occur—or even that it *might* occur—in the
6 reasonably foreseeable future.” *Singh v. Whitaker*, 362 F. Supp. 3d 93, 102
7 (W.D.N.Y. 2019).

8 ICE’s plan to eventually request a travel document for Mr. Subedi does not
9 move the needle, because good faith efforts to secure a travel document do not
10 satisfy *Zadvydas*. The petitioner in *Zadvydas* appealed a “Fifth Circuit h[olding]
11 [that] [the petitioner’s] continued detention [was] lawful as long as good faith
12 efforts to effectuate deportation continue and [the petitioner] failed to show that
13 deportation will prove impossible.” 533 U.S. at 702 (cleaned up). The Supreme
14 Court reversed, finding that the Fifth Circuit’s good-faith-efforts standard
15 “demand[ed] more than our reading of the statute can bear.” *Id.*

16 Thus, “under *Zadvydas*, the reasonableness of Petitioner’s detention does not
17 turn on the degree of the government’s good faith efforts. Indeed, the *Zadvydas*
18 court explicitly rejected such a standard. Rather, the reasonableness of Petitioner’s
19 detention turns on whether and to what extent the government’s efforts are likely to
20 bear fruit.” *Hassoun v. Sessions*, No. 18-CV-586-FPG, 2019 WL 78984, at *5
21 (W.D.N.Y. Jan. 2, 2019). Accordingly, “the Government is required to demonstrate
22 the likelihood of not only the *existence* of untapped possibilities, but also of a
23 probability of success in such possibilities.” *Elashi v. Sabol*, 714 F. Supp. 2d 502,
24 506 (M.D. Pa. 2010). Here, then, “[w]hile the respondent asserts that [Mr. Subedi’s]
25 travel document requests” with a third country will be lodged, “this is insufficient.
26 It is merely an assertion of good-faith efforts to secure removal; it does not make
27 removal likely in the reasonably foreseeable future.” *Gilali v. Warden of McHenry*
28 *Cnty.*, No. 19-CV-837, 2019 WL 5191251, at *5 (E.D. Wis. Oct. 15, 2019).

1 With no evidence of any likelihood of removal at any time, the government
2 has not met its burden, and this Court must grant the petition.

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

5 The record therefore reflects that Mr. Subedi will not be removed to a third
6 country in the reasonably foreseeable future. But ICE would remove him to a third
7 country if it could, and something could unexpectedly change to make that feasible.
8 To protect against that possibility, this Court should require the government to
9 provide the notice set forth in *D.V.D. v. U.S. Dep't of Homeland Sec.*, No. CV 25-
10 10676-BEM, 2025 WL 1453640, at *1 (D. Mass. May 21, 2025), before removing
11 Mr. Subedi to any other third country. The government's typical arguments to the
12 contrary are meritless.

13 *First*, the Supreme Court's decision in *D.V.D.* does not affect this Court's
14 authority to order injunctive relief in this individual case. In *D.V.D.*, the government
15 sought a stay based on procedural arguments applicable only to class actions. *Dep't*
16 *of Homeland Sec. v. D.V.D.*, 145 S. Ct. 2153, 2160 (2025) (Sotomayor, J.,
17 dissenting). But "even if the Government [was] correct that classwide relief was
18 impermissible" in *D.V.D.*, Respondents still "remain[] obligated to comply with
19 orders enjoining [their] conduct with respect to individual plaintiffs" like Mr.
20 Subedi. *Id.* Thus, the Supreme Court's decision does not override this Court's
21 authority to grant individual injunctive relief. *See Nguyen v. Scott*, No. 2:25-CV-
22 01398, 2025 WL 2419288, at *20–23 (W.D. Wash. Aug. 21, 2025).

23 *Second*, Mr. Subedi can seek this relief in this habeas petition despite the
24 pending class action. The Ninth Circuit held as much in analogous circumstances
25 in *Pride v. Correa*, which permitted a detained person to individually challenge his
26 own inadequate medical care despite a pending class action challenging medical
27 care at the facility. 719 F.3d 1130, 1137 (9th Cir. 2013). The Ninth Circuit reasoned
28 that "[i]ndividual claims for injunctive relief related to medical treatment are

1 discrete from the claims for systemic reform addressed in” a class action. *Id.*
2 “Consequently, where an inmate brings an independent claim for injunctive relief
3 solely on his own behalf for medical care that relates to him alone, there is no
4 duplication of claims or concurrent litigation.” *Id.* Otherwise, individual plaintiffs
5 “would be powerless to petition the courts for redress of the violation until” a class
6 action, which can take years to finish, “has been fully resolved.” *Id.* The Court
7 therefore rejected the contention that “an individual claim for injunctive relief may
8 be delayed because a pending class action seeks systemic reform relating to the
9 same general subject matter.” *Id.*

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

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

1 fear, an additional 15 days to move to reopen. *D.V.D. v. U.S. Dep't of Homeland*
2 *Sec.*, No. CV 25-10676-BEM, 2025 WL 1453640, at *1 (D. Mass. May 21, 2025).
3 This Court should follow suit.

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

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

12 “[Section] 1252(g) does not prohibit challenges to unlawful practices merely
13 because they are in some fashion connected to removal orders.” *Id.* Instead, 1252(g)
14 is “limited . . . to actions challenging the Attorney General's discretionary decisions
15 to initiate proceedings, adjudicate cases, and execute removal orders.” *Arce v.*
16 *United States*, 899 F.3d 796, 800 (9th Cir. 2018). It does not apply to arguments
17 that the government “entirely lacked the authority, and therefore the discretion,” to
18 carry out a particular action. *Id.* at 800. Thus, § 1252(g) applies to “discretionary
19 decisions that [the Secretary] actually has the power to make, as compared to the
20 violation of his mandatory duties.” *Ibarra-Perez*, 2025 WL 2461663, at *9.

21 The same logic applies to all of Mr. Subedi’s claims, because he challenges
22 only violations of ICE’s mandatory duties under statutes, regulations, and the
23 Constitution. Accordingly, “[t]hough 8 U.S.C § 1252(g), precludes this Court from
24 exercising jurisdiction over the executive's decision to ‘commence proceedings,
25 adjudicate cases, or execute removal orders against any alien,’ this Court has habeas
26 jurisdiction over the issues raised here, namely the lawfulness of [Mr. Subedi’s]
27 continued detention and the process required in relation to third country removal.”
28 *Y.T.D.*, 2025 WL 2675760, at *5. Many courts agree. *See, e.g., Kong*, 62 F.4th at

1 617 (“§ 1252(g) does not bar judicial review of Kong's challenge to the lawfulness
2 of his detention,” including ICE’s “fail[ure] to abide by its own regulations”);
3 *Cardoso v. Reno*, 216 F.3d 512, 516 (5th Cir. 2000) (“[S]ection 1252(g) does not
4 bar courts from reviewing an alien detention order[.]”); *Parra v. Perryman*, 172
5 F.3d 954, 957 (7th Cir. 1999) (1252(g) did not apply to a “claim concern[ing]
6 detention”); *J.R. v. Bostock*, No. 2:25-CV-01161-JNW, 2025 WL 1810210, at *3
7 (W.D. Wash. June 30, 2025) (1252(g) did not apply to claims that ICE was “failing
8 to carry out non-discretionary statutory duties and provide due process”); *D.V.D. v.*
9 *U.S. Dep't of Homeland Sec.*, 778 F. Supp. 3d 355, 377–78 (D. Mass. 2025)
10 (1252(g) did not bar review of “the purely legal question of whether the
11 Constitution and relevant statutes require notice and an opportunity to be heard
12 prior to removal of an alien to a third country”).

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Respectfully submitted,

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s/ Katie Hurrelbrink

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