

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA**

██████████ ██████████
██████████

Petitioner,

v.

William BARR, U.S. Attorney General;

Chad WOLF, Acting Secretary,
Department of Homeland Security;

Matthew ALBENCE, Senior Official
Performing the Duties of the Director,
Immigration and Customs Enforcement;

Shawn BYERS, Acting Director, St. Paul
Field Office, Immigration and Customs
Enforcement; and

Kurt FREITAG, Sheriff, Freeborn
County,

Respondents.

Civil Action No: 20-cv-██████████

**PETITION FOR WRIT OF HABEAS
CORPUS**

8 U.S.C. § 1231

28 U.S.C. § 2241

I. INTRODUCTION

1. Respondents are unlawfully detaining Petitioner, ██████████ ██████████
██████████ (“Mr. ██████████” under the Immigration and Nationality Act
 (“INA”), 8 U.S.C. § 1231. Respondents are currently unlawfully and unreasonably
subjecting Mr. ██████████ to prolonged and indefinite post-order detention,
with no likelihood of removal in the reasonably foreseeable future. Mr.
██████████ was ordered removed on February 11, 2020, and waived appeal,

rendering his removal order administratively final on that date. Respondents have detained Mr. [REDACTED] for more than 180 days under § 1231, in excess of the statutory removal period and the presumptively reasonable period under *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). To date, Mr. [REDACTED] is not aware of the existence of any valid travel document and Immigration and Customs Enforcement (“ICE”) has not informed him of any specific plans to remove him to Afghanistan.

2. Mr. [REDACTED] was admitted to the United States on December 16, 2015 with a Special Immigrant Visa under the Afghan Allies Protection Act of 2009. ICE detained Mr. [REDACTED] and initiated removal proceedings against him on or about December 27, 2019, following a conviction for child abuse in Nebraska. The Immigration Judge found Mr. [REDACTED] removable under 8 U.S.C. §§ 1227(a)(2)(E)(i) and 1227(a)(2)(A)(i) and ordered him removed to Afghanistan on February 11, 2020. Mr. [REDACTED] waived appeal, rendering his removal order administratively final on February 11, 2020.
3. On or about May 7, 2020, ICE conducted a 90-day custody review for Mr. [REDACTED]. ICE appears to have determined that removal was significantly likely in the reasonably foreseeable future on the basis of the existence of a final order of removal. Mr. [REDACTED] does not have any evidence that a valid travel document has been issued and ICE has not informed Mr. [REDACTED] of any specific plans to remove him to Afghanistan.
4. On or about July 16, 2020, Mr. [REDACTED] completed an interview with ICE

as a part of his 180-day review. Mr. [REDACTED] still has not received a decision on this review but believes ICE will decide to continue his custody, as he is still detained.

5. Mr. [REDACTED] is aware of official government sources—including the United States Department of State—indicating that the Afghanistan Civil Aviation Authority announced international flights to Afghanistan had resumed as of June 24, 2020, after being suspended since March 2020 due to the COVID-19 outbreak. Given that international flights resumed to Afghanistan 60 days ago and ICE has not yet been able to execute Mr. [REDACTED] removal, it appears unlikely that ICE will be able to do so in the reasonably foreseeable future. Consequently, Mr. [REDACTED] is faced with indefinite and prolonged detention.
6. The Supreme Court has held that it is presumptively reasonable for the government to detain a noncitizen with a final order of removal for six months or less. *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). “After this 6-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing.” *Id.* “[T]he habeas court must ask whether the detention in question exceeds a period reasonably necessary to secure removal. It should measure reasonableness primarily in terms of the statute’s basic purpose, namely assuring the alien’s presence at the moment of removal. Thus, if removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized by statute.” *Id.* at 699–

700.

7. Here, the removal period began to run on February 11, 2020, the date the removal order became administratively final. § 1231(a)(1)(A). Mr. [REDACTED] detention during this removal period has exceeded 180 days. Despite ICE's custody determination on May 7, 2020, there is no substantial likelihood of removal in the reasonably foreseeable future, evidenced by the fact that ICE has been unable to execute Mr. [REDACTED] removal order despite the ban on international flights to Afghanistan being lifted 60 days ago. A generalized intent to carry out Mr. [REDACTED] removal alone is not sufficient, without more, to show that removal is substantially likely to occur in the reasonably foreseeable future.
8. Mr. [REDACTED] has been detained by Respondents for a total of approximately 240 days. His current detention pursuant to § 1231 has persisted for 194 days with no end in sight, and without the intervention of this Court he may be subjected to indefinite detention.
9. To remedy this unlawful detention, Mr. [REDACTED] seeks declaratory and injunctive relief in the form of immediate release from detention on reasonable conditions determined by ICE pursuant to 8 C.F.R. § 241.5.
10. Mr. [REDACTED] also requests that this Court order Respondents to produce a copy of any valid travel document they possess for him, and evidence demonstrating the significant likelihood of his forthcoming removal to

Afghanistan.¹

II. JURISDICTION AND VENUE

11. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331 (federal question), § 1361 (federal employee mandamus action), § 1651 (All Writs Act), and § 2241 (habeas corpus); Art. I, § 9, cl. 2 of the U.S. Constitution (“Suspension Clause”); 5 U.S.C. § 702 (Administrative Procedure Act); and 28 U.S.C. § 2201 (Declaratory Judgment Act). Because Mr. [REDACTED] seeks to challenge his custody as a violation of the Constitution, laws, or treaties of the United States, jurisdiction is proper in this court. Federal district courts have jurisdiction under 28 U.S.C. § 2241 to hear habeas petitions by noncitizens challenging the lawfulness of their detention. *See Zadvydas v. Davis*, 533 U.S. 678, 687 (2001) (“[T]he primary federal habeas corpus statute, 28 U.S.C. § 2241, confers jurisdiction upon the federal courts to hear these cases.”); *Moallin v. Cangemi*, 427 F.Supp.2d 908, 920–21 (D. Minn. 2006).
12. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(b), (e)(1)(B), and 2241(d) because Mr. [REDACTED] is detained within this District. Venue is also proper in this Court pursuant to 28 U.S.C. § 1391(e)(1)(A) because some of the Respondents are headquartered within this District.

¹ Petitioner would have no objection to such documents being produced under seal or a protective order. Petitioner makes this request for an order compelling production, in no small part, due to Magistrate Judge Schultz’s “serious concerns about Respondents’ candor” in a recent post-order detention case involving a Somali national. Report and Recommendation & Order, *Yusuf v. Barr*, No. 20-cv-1091 (ECT/DTS), at *14 (D. Minn. June 16, 2020), ECF No. 31.

III. PARTIES

13. Petitioner [REDACTED] [REDACTED] is a native and citizen of Afghanistan. Mr. [REDACTED] was admitted to the United States on December 16, 2015 with a Special Immigrant Visa under the Afghan Allies Protection Act of 2009. On or about December 27, 2019, he was detained by ICE following a conviction for child abuse in Nebraska. His order of removal was entered and became final on February 11, 2020. He has been held in continued post-order detention since that time.
14. Respondent William Barr is being sued in his official capacity as the Attorney General of the United States and the head of the Department of Justice, which encompasses the Board of Immigration Appeals and the immigration judges as a subunit—the Executive Office for Immigration Review. Attorney General Barr shares responsibility for implementation and enforcement of the immigration laws, including detention statutes, along with Respondent Wolf. Attorney General Barr is a legal custodian of Mr. [REDACTED] Attorney General Barr’s official address is 950 Pennsylvania Avenue NW, Washington, D.C. 20530.
15. Respondent Chad Wolf is being sued in his official capacity as the Acting Secretary of the Department of Homeland Security. In this capacity, Acting Secretary Wolf is responsible for the administration of the immigration laws pursuant to § 103(a) of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1103(a), routinely transacts business in the District of Minnesota, supervises the St. Paul ICE Field Office, and is legally responsible for pursuing Mr. Mohammad

Aziz's detention and removal, and as such is a legal custodian of Mr. [REDACTED]
[REDACTED] Acting Secretary Wolf's official address is 245 Murray Lane SW,
Washington, D.C. 20528.

16. Respondent Matthew Albence is being sued in his official capacity as the Senior Official Performing the Duties of the Director ("SOPDD") of Immigration and Customs Enforcement, a sub-unit of the Department of Homeland Security. In that capacity, SOPDD Albence has supervisory capacity over ICE personnel in Minnesota, and he is the head of the agency that retains legal custody of Mr. [REDACTED] SOPDD Albence's official address is 500 12th Street SW, Washington, D.C. 20536.
17. Respondent Shawn Byers is being sued in his official capacity as the Acting Field Office Director for the St. Paul Field Office for ICE within DHS. In that capacity, Acting Field Director Byers has supervisory authority over the ICE agents responsible for detaining Mr. [REDACTED] The address for the St. Paul Field Office is 1 Federal Drive, Suite 1601, Fort Snelling, Minnesota 55111.
18. Respondent Kurt Freitag is being sued in his official capacity as the Sheriff of Freeborn County, Minnesota. In that capacity, Sheriff Freitag is responsible for the Freeborn County Jail—a detention facility under contract with ICE and the physical location where Mr. [REDACTED] is currently in custody. The address for Freeborn County Jail is 411 South Broadway Avenue, Albert Lea, Minnesota, 56007.

IV. EXHAUSTION

19. Mr. [REDACTED] has exhausted his administrative remedies as required by law. Judicial action is his only remedy. Mr. [REDACTED] is being detained despite his removal being significantly unlikely in the foreseeable future. Mr. [REDACTED] completed a custody review with ICE, which arbitrarily decided to continue detaining him. There is no appeal process for custody decisions in this situation.
20. No statutory exhaustion requirement applies to Mr. [REDACTED] claim of unlawful detention.
21. The immigration court does not have jurisdiction to order Mr. [REDACTED] released.
22. No administrative remedies currently exist under the law to challenge indefinite post-order detention where there is no reasonable likelihood that removal will occur in the foreseeable future.

V. FACTUAL ALLEGATIONS & PROCEDURAL HISTORY

23. Petitioner, [REDACTED] [REDACTED] is a 48-year-old native and citizen of Afghanistan.
24. Mr. [REDACTED] was admitted to the United States on December 16, 2015 with a Special Immigrant Visa under the Afghan Allies Protection Act of 2009.
25. On or about December 27, 2019, Mr. [REDACTED] was detained by ICE following a conviction for child abuse in Nebraska.
26. The Immigration Judge sustained the charges of removability lodged against Mr. [REDACTED] under 8 U.S.C. §§ 1227(a)(2)(E)(i) and 1227(a)(2)(A)(i) and

- ordered him removed to Afghanistan. Mr. [REDACTED] waived appeal, rendering his removal order administratively final on February 11, 2020. Ex. A.
27. On May 7, 2020, ICE held a 90-day custody review. ICE decided to continue Mr. [REDACTED] detention at that time on the basis that “You have been issued an Order of Removal by an immigration judge out of Omaha, NE. There is a significant likelihood of your removal in the reasonably foreseeable future.” Ex. D.
28. On July 16, 2020, ICE held a 180-day custody review. Petitioner has still not received a decision on this review. Ex. E.
29. Mr. [REDACTED] has been detained by Respondents for 194 days since his removal order became administratively final. Respondents have, to date, been unable to execute Mr. [REDACTED] removal and do not have definite plans to do so in the near future.
30. Mr. [REDACTED] has complied with all requests by Respondents and has fully cooperated with Respondents’ efforts to remove him.
31. Mr. [REDACTED] has no evidence that a valid travel document exists.
32. Mr. [REDACTED] has no evidence of plans to execute his removal to Afghanistan.
33. In March 2020, the Civil Aviation Authority of Afghanistan implemented flight restrictions, including a suspension of international flights. *See* Shadi Khan Saif, “Afghanistan resumes international flights amid COVID-19,” Anadolu Agency (June 24, 2020), *available at* <https://www.aa.com.tr/en/asia-pacific/afghanistan->

resumes-international-flights-amid-covid-19/1888176 (accessed Aug. 22, 2020).

34. International flights into Afghanistan resumed on June 24, 2020. *See* U.S. Embassy in Afghanistan, “COVID-19 Information” (updated Aug. 7, 2020), available at <https://af.usembassy.gov/covid-19-information/> (accessed Aug. 22, 2020).
35. As of the date of this filing, Mr. [REDACTED] has spent 240 days in ICE custody, with 194 days of post-order detention.
36. Mr. [REDACTED] has exhausted his administrative remedies. No other court of competent jurisdiction has the authority to order the release of Mr. [REDACTED]
[REDACTED]

VI. LEGAL FRAMEWORK

A. STATUTORY & REGULATORY FRAMEWORK

37. Under 8 U.S.C. § 1231, noncitizens with a final order of removal shall be removed from the United States within a period of 90 days. 8 U.S.C. § 1231(a)(1)(A).
38. The beginning of the 90-day removal period is determined by the latest of the following:
 - (i) The date the order of removal becomes administratively final.
 - (ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court’s final order.
 - (iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

Id. at § 1231(a)(1)(B).

39. During the removal period, the noncitizen may be detained, and may not be released under any circumstances if found inadmissible or deportable on criminal

or national security grounds. § 1231(a)(2).

40. If the noncitizen is not removed during the 90-day period, he or she “shall be subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien”:

(A) to appear before an immigration officer periodically for identification;
 (B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;
 (C) to give information under oath about the alien’s nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and
 (D) to obey reasonable written restrictions on the alien’s conduct or activities that the Attorney General prescribes for the alien.

§ 1231(a)(3).

41. The removal period may be extended beyond 90 days and the noncitizen may remain detained if the noncitizen frustrates his or her removal. § 1231(a)(1)(C).
42. Alternatively, the noncitizen may be detained beyond the 90 days if he or she is inadmissible under § 1182 or removable under various sections of § 1227, or determined to be a risk to the community or unlikely to comply with the order of removal. § 1231(a)(6); 8 C.F.R. § 241.4(a).

B. PROLONGED DETENTION

43. The Due Process Clause of the Fifth Amendment requires that “[n]o person shall . . . be deprived of liberty . . . without due process of law.” “Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects.” *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)). In

the context of immigration detention, at a minimum, detention must “bear[] a reasonable relation to the purpose for which the individual [was] committed.” *Id.* (citing *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)). If “detention’s goal is no longer practically attainable,” detention becomes unreasonable and therefore violates the Fifth Amendment right to due process. *Id.*

44. The Fifth Amendment Due Process Clause also requires that Respondents follow procedures that are adequate to establish that detention is both statutorily and constitutionally valid. *See Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996) (“due process places a heightened burden of proof on the State in civil proceedings in which the individual interests at stake . . . are both particularly important and more substantial than mere loss of money.”).
45. Under the canon of constitutional avoidance, no immigration detention statute should be construed in a way that would violate the Constitution where it is “fairly possible” to avoid doing so. *Zadvydas*, 533 U.S. at 689.
46. In *Zadvydas*, the Supreme Court held that, while the statute provides for a removal period of 90 days, post-order detention up to 180 days was presumptively reasonable. *Id.* at 701. After six months, the burden is on the government to rebut a showing by the noncitizen “that there is no significant likelihood of his removal in the reasonably foreseeable future.” *Id.* “[W]hat constitutes the ‘reasonably foreseeable future’ shrinks as the total period of postremoval confinement grows.” *Moallin v. Cangemi*, 427 F. Supp. 2d 908, 915 (D. Minn. 2006).

VII. CAUSES OF ACTION

COUNT ONE: VIOLATION OF 8 U.S.C. § 1231 – PROLONGED DETENTION

47. Petitioner re-alleges and incorporates by reference the paragraphs above.
48. Mr. [REDACTED] detention has exceeded and will continue to exceed the six-month presumptive threshold under *Zadvydas*, as he has now been detained for 194 days under § 1231, and a total of 240 days in Respondents' custody.
49. There is no substantial likelihood that ICE will be able to execute the removal of Mr. [REDACTED] to Afghanistan in the reasonably foreseeable future.
50. Therefore, 8 U.S.C. § 1231 does not authorize continued detention of Mr. [REDACTED]

**COUNT TWO: VIOLATION OF FIFTH AMENDMENT
SUBSTANTIVE DUE PROCESS**

51. Petitioner re-alleges and incorporates by reference the paragraphs above.
52. The Fifth Amendment Due Process Clause protects against arbitrary and indefinite detention by the executive branch. *Zadvydas*, 533 U.S. at 699.
53. Due process requires that detention be reasonably related to its purpose and accompanied by adequate procedures to ensure that detention is serving its legitimate goals. *See Zadvydas*, 533 U.S. at 690-91. As removal is not reasonably foreseeable for Mr. [REDACTED] and Respondents have provided no indication of concrete plans, as opposed to vague intent, for a forthcoming removal, his detention is arbitrary and unreasonable, and therefore in violation of the Fifth Amendment's guarantee of Due Process.

PRAYER FOR RELIEF

WHEREFORE, Petitioner asks this Court for the following relief:

1. Assume jurisdiction over this matter;
2. Expedite consideration of this action pursuant to 28 U.S.C. § 1657 because it is an action brought under chapter 153 (habeas corpus) of Title 28;
3. Pursuant to 28 U.S.C. § 2243 issue an order directing the Respondents to show cause within 3 days why the writ of habeas corpus should not be granted;
4. Order Respondents to produce to the Court and Petitioner any valid travel document for Petitioner in their possession;
5. Order Respondents to produce to the Court and Petitioner evidence demonstrating their ability to execute the Respondent's removal to Afghanistan;
6. Grant Petitioner a writ of habeas corpus directing the Respondents to immediately release Petitioner from custody on an Order of Supervision with any reasonable conditions deemed necessary pursuant to 8 C.F.R. § 241.5; and
7. Grant any and all further relief this Court deems just and proper.

DATED: August 23, 2020

Respectfully submitted,

/s/ Casey Schultz Bruning

Casey Schultz Bruning (MN #391570)

Pro Bono Attorney

John Bruning (MN #399174)

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA**

<div data-bbox="198 394 776 428" style="background-color: black; height: 16px; margin-bottom: 10px;"></div> <div data-bbox="386 464 531 497" style="text-align: center;">Petitioner,</div> <div data-bbox="293 541 326 569" style="text-align: center;">v.</div> <div data-bbox="198 606 802 644" style="text-align: center;">William BARR, U.S. Attorney General, et al.,</div> <div data-bbox="386 680 568 718" style="text-align: center;">Respondents.</div>	<div data-bbox="885 464 1265 497" style="text-align: center;">Civil Action No.: 20-cv-[REDACTED]</div> <div data-bbox="885 606 1083 640" style="text-align: center;">Exhibit Index</div>
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**PETITIONER’S EXHIBIT INDEX IN SUPPORT OF PETITION
FOR WRIT OF HABEAS CORPUS**

EXHIBIT	DESCRIPTION
A	Order of the Immigration Judge, February 11, 2020
B	Warning for Failure to Depart, March 20, 2020
C	Notice to Alien of File Custody Review
D	Decision to Continue Detention, May 7, 2020
E	Notice to Alien of Interview for Review of Custody Status

DATED: August 23, 2020

Respectfully submitted,

/s/ Casey Schultz Bruning
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