

District Judge Ricardo S. Martinez
Magistrate Judge S. Kate Vaughan

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANDREY BERNIK,

Petitioner,

v.

PAMELA BONDI, *et al.*,

Respondents.

Case No. 2:25-cv-00957-RSM-SKV

FEDERAL RESPONDENTS'
RETURN AND MOTION TO DISMISS

Noted for Consideration:
July 28, 2025

I. INTRODUCTION

This Court should dismiss Petitioner Andrey Bernik's Petition for Writ of Habeas Corpus. Dkt No. 6 ("Pet."). As a noncitizen subject to an administratively final order of removal, Bernik is lawfully detained pursuant to Section 241 of the Immigration and Nationality Act ("INA"). *See* 8 U.S.C. § 1231. His approximate eight-month detention since the issuance of his final order of removal is not unconstitutionally indefinite. *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). ICE attests that it is actively working on removing Bernik from the United States. Accordingly, Respondents respectfully request that the Court deny the Petition and grant the Motion to Dismiss.

This motion is supported by the pleadings and documents on file in this case, the Declaration of Supervisory Detention and Deportation Office Jamie Burns ("Burns Decl."), and the Declaration of Sean M. Arenson ("Arenson Decl.") with exhibits attached thereto. Respondents do not believe that an evidentiary hearing is necessary.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Detention Authorities and Removal Procedures

The INA governs the detention and release of noncitizens during and following their removal proceedings. See *Johnson v. Guzman Chavez*, 594 U.S. 523, 527 (2021). The general detention periods are Typically referred to as "pre-order" (meaning before the entry of a final order of removal) and, relevant here, "post-order" (meaning after the entry of a final order of removal). Compare 8 U.S.C. § 1226 (authorizing pre-order detention) with § 1231(a) (authorizing post-order detention).

When a final order of removal has been entered, a noncitizen enters a 90-day "removal period." 8 U.S.C. § 1231(a)(1). Congress has directed that the Secretary of Homeland Security "shall remove the [noncitizen] from the United States." *Id.* To ensure a noncitizen's presence for removal and to protect the community from dangerous noncitizens while removal is being effectuated, Congress mandated detention:

During the removal period, the [Secretary of Homeland Security]¹ shall detain the [noncitizen]. Under no circumstance during the removal period shall the [Secretary] release [a noncitizen] who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

8 U.S.C. § 1231(a)(2).

¹ Although 8 U.S.C. § 1231(a)(2) refers to the "Attorney General" as having responsibility for detaining noncitizens, the Homeland Security Act of 2002, Pub. L. No. 107-296 § 441(2), 116 Stat. 2135, 2192 (2002), transferred this authority to the Secretary of the Department of Homeland Security ("DHS"). See also 6 U.S.C. § 251.

1 Section 1231(a)(6) authorizes DHS to continue detention of noncitizens after the
2 expiration of the removal period. Unlike Section 1231(a)(2), Section 1231(a)(6) does not
3 mandate detention and does not place any temporal limit on the length of detention under
4 that provision:

5 [A noncitizen] ordered removed who is inadmissible under section 1182, removable
6 under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been
7 determined by the [the Secretary of Homeland Security] to be a risk to the community
or unlikely to comply with the order of removal, *may* be detained *beyond the removal*
period and, if released, shall be subject to the terms of supervision in paragraph (3).

8 8 U.S.C. § 1231(a)(6) (emphasis added).

9 During the removal period, ICE² is charged with attempting to effect removal of a
10 noncitizen from the United States. 8 U.S.C. § 1231(a)(1). Although there is no statutory
11 time limit on detention pursuant to Section 1231(a)(6), the Supreme Court has held that a
12 noncitizen may be detained only “for a period reasonably necessary to bring about that
13 [noncitizen’s] removal from the United States.” *Zadvydas*, 533 U.S. at 689. The Supreme
14 Court has further identified six months as a presumptively reasonable time to bring about
15 a noncitizen’s removal. *Id.*, at 701.

16 In this case, Bernik is the subject of an administrative order of removal that
17 became final on November 7, 2024. Accordingly, the removal period expired on
18 February 5, 2025. 8 U.S.C. § 1231(a)(1)(B)(i). The “presumptively reasonable” six-
19 month period expired on May 7, 2025. *Zadvydas*, 533 U.S. at 701. After the expiration of
20 the presumptively reasonable period, Bernik commenced this habeas action on May 20,
21 2025. Dkt. No. 1.

22
23
24 ² Under 8 C.F.R. § 241.2(b), ICE deportation officers are delegated the Secretary of Homeland Security’s authority to execute removal orders.

1 **B. Petitioner Bernik**

2 Bernik is a native and citizen of Ukraine. Burns Decl. ¶ 3; Arenson Decl. Ex. A (Form I-
3 213) at 3. He was admitted to the United States as a lawful permanent resident on November 26,
4 1990. Burns Decl. ¶ 4; Arenson Decl. Ex. A at 3. Petitioner was convicted of Second-Degree
5 Murder, in violation of California Penal Code (CPC) § 187(a), on November 18, 2011, in the
6 Superior Court of California, County of Sacramento. Burns Decl. ¶ 5; Arenson Decl. Ex. A at 3.
7 He was sentenced to a term of imprisonment of 20 years to life with the possibility of parole and
8 a 25-year firearm enhancement per CPC § 12022.53(d), for a total term of imprisonment of 45
9 years to life with the possibility of parole. *Id.*

10 California Governor Gavin Newsom commuted Bernik's sentence in 2022, and on June
11 6, 2024, he was found eligible for parole. Burns Decl. ¶ 6-7; Arenson Decl. Ex. A at 2. He was
12 taken into ICE custody on September 25, 2024, at the Northwest ICE Processing Center
13 ("NWIPC") in Tacoma, Washington. Burns Decl. ¶ 8; Arenson Decl. Exs. A at 2, B (Notice of
14 Custody Determination), C (Warrant for Arrest of Alien).

15 On October 8, 2024, DHS issued a Notice to Appear ("NTA") charging Bernik as
16 removable pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii). Burns Decl. ¶ 9; Arenson Decl. Ex. D
17 (NTA) at 1.

18 On November 7, 2024, an Immigration Judge ("IJ") ordered Bernik be removed to
19 Ukraine. Burns Decl. ¶ 10; Arenson Decl. Ex. E (Order of the IJ) at 1. This order became
20 administratively final on the same day because Bernik waived his right to appeal the order.
21 Burns Decl. ¶ 10; Arenson Decl. Ex. E at 3.

22 On January 10, 2025, ICE notified Bernik that his case would be reviewed for
23 consideration of release if he had not been removed from the United States within the removal
24 period. Arenson Decl., Ex. F (File Custody Review Notice). The notice informed him that he

1 could submit documentation in support of his release. *Id.* Based on this custody review,
2 including review of the information submitted by Bernik, ICE determined that his detention
3 would continue because he had not demonstrated that, if released, he would not pose a danger to
4 the community, to the safety of other persons, or to property. Arenson Decl., Ex. G (Decision to
5 Continue Detention).

6 Currently, there are no removals happening to Ukraine. Burns Decl. ¶ 12. As a result,
7 ICE has petitioned countries other than Ukraine to accept Bernik. *Id.* On May 1, 2025, ICE sent
8 requests to accept Bernik to the United Kingdom, Germany, and Spain, and on June 27, 2025,
9 ICE sent requests to accept Bernik to El Salvador, Mexico, and Canada. *Id.* ¶¶ 13, 16. As of this
10 date, the United Kingdom and Germany have declined to accept Bernik, and Spain, El Salvador,
11 Mexico, and Canada have not responded. *Id.* ¶¶ 14, 15, 17, 18.

12 III. ARGUMENT

13 Bernik cannot demonstrate that his detention has become “indefinite” or
14 unconstitutional. In *Zadvydas*, the Supreme Court analyzed whether the potentially open-ended
15 duration of detention pursuant to 8 U.S.C. § 1231(a)(6) is constitutional. The Court read an
16 implicit limitation of post-removal detention “to a period reasonably necessary to bring about
17 that alien’s removal from the United States.” *Zadvydas*, 533 U.S. at 689. It was further specified
18 that Section 1231(a)(6) does not permit indefinite detention. *Id.* Thus, “once removal is no
19 longer reasonably foreseeable, continued detention is no longer authorized by statute.” *Id.*, at
20 699.

21 The *Zadvydas* Court recognized that as the length of post-order detention grows, a
22 sliding scale of burdens is applied to assess the continuing lawfulness of a noncitizen’s post-
23 order detention. *Id.*, at 701 (stating that “for detention to remain reasonable, as the period of
24 post-removal confinement grows, what counts as the ‘reasonably foreseeable future’ conversely

1 would have to shrink”). However, the Supreme Court determined that it is “presumptively
2 reasonable” for the Government to detain a noncitizen for six months following entry of a final
3 removal order, while it worked to remove the noncitizen from the United States. *Id.*, at 701.
4 Thus, the Supreme Court implicitly recognized that six months is the earliest point at which a
5 noncitizen’s detention could raise constitutional issues. *Id.* Moreover, as the Supreme Court has
6 noted, the six-month presumption “does not mean that every alien not removed must be released
7 after six months. To the contrary, an alien may be held in confinement until it has been
8 determined that there is no significant likelihood of removal in the reasonably foreseeable
9 future.” *Id.*

10 Here, ICE has detained Bernik for approximately eight months since his order of
11 removal became administratively final. ICE attests that it is actively working on removing
12 Bernik from the United States. Burns Decl. at 3. The fact that Bernik does not yet have a
13 specific date of anticipated removal does not make his detention indefinite. *Diouf v. Mukasey*
14 (“*Diouf I*”), 542 F. 3d 1222, 1233 (9th Cir. 2008).

15 The fact that removals are not currently being made to Ukraine does not, by itself,
16 demonstrate that his removal in the foreseeable future is unlikely. The *Zadvydas* Court
17 considered the continued detention of Cambodian national Kim Ho Ma. *Zadvydas*, 533 U.S. at
18 685-86. There, Cambodia lacked a repatriation treaty with the United States at that time. *Id.* The
19 Ninth Circuit affirmed Ma’s release from detention resulting from a district court’s order
20 forbidding post-removal detention where there was no realistic chance of removal to Cambodia.
21 *Id.* Yet, the *Zadvydas* Court did not find that the absence of an “extant or pending” repatriation
22 agreement alone was enough to determine the reasonable likelihood of Ma’s removal in the
23 foreseeable future. *Id.*, at 702. Instead, the Court remanded Ma’s case for the lower court to
24 determine whether it had given “due weight to the likelihood of successful future negotiations.”

1 *Id.* Here, ICE attests that it is actively working on removing Bernik from the United States
2 through requests to numerous countries. Burns Decl. ¶¶ 13-18.

3 Furthermore, Bernik's detention is reasonable considering the Secretary's authority to
4 detain noncitizens determined "to be a risk to the community or unlikely to comply with the
5 order of removal." 8 U.S.C. § 1231(a)(6). ICE recently conducted a review of Bernik's custody
6 status to ensure his detention meets this standard. Arenson Decl., Ex. G.

7 Accordingly, Bernik's detention has not become "indefinite," and this Court should not
8 order that he be released.

9 **IV. CONCLUSION**

10 For the foregoing reasons, Federal Respondents respectfully request that this Court deny
11 the Petition and dismiss this matter.

12 DATED this 30th day of June, 2025.

13 Respectfully submitted,

14 TEAL LUTHY MILLER
15 Acting United States Attorney

16 *s/ Sean M. Arenson*

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21 *Attorneys for Federal Respondents*

22 *I certify that this memorandum contains 1,715*
23 *words, in compliance with Local Civil Rules.*