DISTRICT JUDGE RICARDO S. MARTINEZ
MAGISTRATE JUDGE S. KATE VAUGHAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANDREY BERNIK, Petitioner, v. PAMELA BONDI, *et al.*, Respondents.	No. CV25-00957-RSM-SKV ANDREY BERNIK'S RESPONSE TO MOTION TO DISMISS

ICE has detained Andrey Bernik for more than eight months since he was granted parole after the governor of California commuted his sentence. Dkt. 10 at 3. ICE cannot deport Mr. Bernik to Ukraine because that country is at war. *Id.* at 5. Furthermore, despite ICE's best efforts, no other country will accept him. *Id.*[1] Because Mr. Bernik's removal from the United States therefore is not "substantially likely" in

[1] ICE has informed Mr. Bernik that Spain, Mexico, and Canada refused to accept him, and that El Salvador has not responded. Authorities in El Salvador tortured the people that ICE recently deported from the U.S. *See, e.g.*, "We Were Kidnapped: On Friday, more than 200 Venezuelans disappeared to a megaprison in El Salvador returned home. The horror stories are already emerging." *Mother Jones* (July 18, 2025); "Abrego Garcia says he was severely beaten in Salvadoran prison." National Public Radio, July 3, 2025; *J.G.G. v. Trump*, 2025 WL 890401 at *16 (D.D.C. 2025) ("inmates [at CECOT] are rarely allowed to leave their cells, have no regular access to drinking water or adequate food, sleep standing up because of overcrowding, and are held in cells where they do not see sunlight for days."). Article 3 of the Convention Against Torture therefore prohibits ICE from continuing to use El Salvador for third-country removals. *See* Article 3, Convention Against Torture (Ratified October 21, 1994) (State Parties may not send a person to another State where there are substantial grounds for believing that the individual would be in danger of being subjected to torture.).

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the "reasonably foreseeable future," *Zadvydas v. Davis*, 533 U.S. 678 (2001), requires his release on conditions.

Despite this authority, ICE advances two arguments—both specious—to justify Mr. Bernik's continued detention. First, it argues that the Court should not order Mr. Bernik's release without first giving "due weight" to the possibility of a diplomatic breakthrough that would permit Mr. Bernik's removal. *See* Dkt. 10 at 6. But ICE itself has concluded that Mr. Bernik cannot be removed to Ukraine and offers no reason to believe that any other country will take him. No further evidentiary foundation is required for the Court to conclude that there is not "good reason" to believe Mr. Bernik will be removed in the reasonably foreseeable future. Secondly, ICE argues that it has the authority to imprison Mr. Bernik because, in ICE's view, he poses a risk to the public. The Supreme Court has rejected that rule, which also is unsupported by the facts.

I. ARGUMENT

A. The Court need not delay Mr. Bernik's release to "give due weight to the likelihood of successful future negotiations."

ICE notes that the Supreme Court remanded the case of Kim Ho Ma so that the district court could gather evidence on the likelihood that diplomacy would permit Mr. Ma's removal to Cambodia in the reasonably foreseeable future. Dkt. 10 at 6 (citing *Zadvydas*, 533 U.S. at 702). ICE then "attests" that it is "actively working on removing Mr. Bernik from the United States through requests to numerous countries." *Id.* Based only on that attestation, ICE urges the Court not to release Mr. Bernik without giving "due weight to the likelihood of future negotiations."

This case, of course, presents a diplomatic problem entirely unlike the situation in *Zadvydas*. Ukraine, unlike Cambodia in 2001, is at war. So long as Ukraine remains actively subject to Russian invasion, "future negotiations" are not "substantially likely"

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to change its policy against accepting deportees. Indeed, ICE's unsuccessful efforts to remove Mr. Bernik to a third country are a concession of the impossibility of removing Mr. Bernik to Ukraine. *See* 8 U.S.C. 1231(b)(1)(C)(iv) (prohibiting third-country removals unless removal to any country of citizenship or foreign residence is "impracticable, inadvisable, or impossible").

Considering that no other country has agreed to accept Mr. Bernik, the Court need not delay his release in order to give "due weight" to the possibility that a diplomatic breakthrough will permit Mr. Bernik's removal to some as-yet-unidentified location where he will not be tortured. But even if the Court agrees with ICE counsel that it does not have sufficient information to give "due weight" to the possibility of a diplomatic breakthrough, the solution is not to leave Mr. Bernik imprisoned without remedy. Rather, the Court should hold the hearing that the Supreme Court ordered in *Zadvydas* and require that ICE present any evidence necessary for the Court to determine the "likelihood" that negotiations will permit Mr. Bernik's removal in the reasonably foreseeable future. *See Bracy v. Gramley*, 520 U.S. 899, 909 (1997) (Where "specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is entitled to relief, *it is the duty of the court* to provide the necessary facilities for an adequate inquiry.") (emphasis added); *Batyuchenko v. Reno*, 56 F. Supp. 2d 1163, 1163 (W.D. Wash. 1999) (ordering an evidentiary hearing to take more evidence regarding "the likelihood of Belarus or Russian reconsidering their decisions" not to claim the petitioner as one of their citizens and "the extent of the government's efforts to secure travel documents . . . from a third country," among other things).

Indeed, *Zadvydas* requires the Court to independently evaluate the government's assertions about the likelihood of removal. *See Zadvydas*, 533 U.S. at 699 ("The Government seems to argue that . . . a federal habeas court would have to accept the

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Government's view about whether the implicit statutory limitation is satisfied in a particular case, conducting little or no independent review of the matter. In our view, that is not so."). The Court may not unquestioningly accept ICE's attestation. *Id.* at 700 (admonishing district courts not to "abdicat[e] their legal responsibility to review the lawfulness of an alien's continued detention"). And the Supreme Court *specifically* rejected the argument, repeated here, that ICE may detain Mr. Bernik so long as it is "actively working" on his removal. *Id.* at 702 (rejecting argument that detention is lawful so long as "good faith efforts to effectuate removal continue").

B. ICE has no statutory authority to detain Mr. Bernik.

ICE next argues that "Bernik's detention is reasonable considering the Secretary's authority to detain noncitizens determined 'to be a risk to the community or unlikely to comply with the order of removal.'" 8 U.S.C. § 1231(a)(6). But that is the exact argument that the Supreme Court rejected in *Zadvydas*. *See id.* at 699–700 ("[I]f removal is not reasonably foreseeable, the court should hold continued detention unreasonable and *no longer authorized by statute*.") (emphasis added). To accept ICE counsel's argument would be to roll the clock back to at time before *Zadvydas* was decided, when federal respondents claimed the power to imprison immigrants for the remainder of their lives free from any judicial oversight at all.

In any case, ICE is no longer credible on issues of detention. *See generally* "Immigration arrests are up 65% in Washington state since Trump took office," *Kitsap Sun* (July 11, 2025) (quoting Kathleen Bush-Joseph, a policy analyst at the nonpartisan Migration Policy Institute: "This administration is trying to keep everyone it can detained,"); "ICE declares millions of undocumented immigrants ineligible for bond hearings," *The Washington Post* (July 15, 2025) (describing administration efforts to detain immigrants "indefinitely until they're deported"). By any objective measure, as

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the attached records show, Mr. Bernik is an excellent candidate for conditional release. *See* Exhibits A-C.

II. CONCLUSION

The record contains no basis for the Court to find a "substantial likelihood" that Mr. Bernik will be removed in the reasonably foreseeable future. In fact, ICE cannot even predict what country he might be removed to. Accordingly, the Court "should hold continued detention unreasonable and no longer authorized by statute" and order Mr. Bernik's release on conditions. *See Singh v. Whitaker*, 362 F. Supp. 3d 93, 101–02 (W.D.N.Y. 2019) ("[I]f DHS has no idea of when it might reasonably expect Singh 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.").

If, however, the Court accepts ICE's argument that it does not have enough evidence to give "due weight" to the possibility that diplomatic efforts will result in Mr. Bernik's removal, the Court should "summarily" hold a hearing to determine the relevant facts. *See* 28 U.S.C. § 2243 ("The court shall summarily hear and determine the facts and dispose of the matter as law and justice require.").

DATED this 21st day of July, 2025.

Respectfully submitted,

s/ *Gregory Murphy*
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I certify that the foregoing contains 1,413 words, in compliance with Local Civil Rules.

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