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10 **IN THE UNITED STATES DISTRICT COURT**
11 **FOR THE DISTRICT OF ARIZONA**

12 Pavlo Malitskyi,

13 Petitioner,

14 v.

15 David R. Rivas, et al.,

16 Respondents.
17
18

No. CV-25.02929-PHX-MTL (JFM)

**RESPONSE IN OPPOSITION TO
MOTION FOR PRELIMINARY
INJUNCTION AND TEMPORARY
RESTRAINING ORDER**

19 **INTRODUCTION**

20 Respondents David R. Rivas, Warden, San Luis Regional Detention Center;
21 Gregory J. Archambeault, San Diego Field Director, U.S. Immigration and Customs
22 Enforcement, Kristi Noem, Secretary of Department of Homeland Security (DHS), and
23 Pam Bondi, Attorney General of the United States (Respondents), through undersigned
24 counsel, respond in opposition to Petitioner's Motion for Preliminary Injunction (PI) and
25 Temporary Restraining Order (TRO). Doc. 3.

26 The Court should deny the motion because Petitioner is mandatorily detained under
27 8 U.S.C. § 1231(a)(1)(A). Following his departure from the United States in February that
28 terminated his parole, Petitioner was issued an expedited removal order in February 2025.
He was recently re-processed for expedited removal pursuant to 8 U.S.C. § 1225(b)(1)(A)

1 and he was issued a valid executable final administrative order of expedited removal
2 yesterday, August 28, 2025. As part of that process, Petitioner was interviewed on August
3 22, 2025, to determine whether he had a fear of persecution or torture if removed from the
4 United States, which he stated that he did not. Petitioner was re-interviewed on August 24,
5 2025, in connection with his re-processing for expedited removal, and he again expressed
6 no fear of persecution or torture if removed from the United States. Because he did not
7 claim a fear of persecution or torture, Petitioner became subject to a valid final expedited
8 removal order on August 28, 2025. Petitioner is lawfully and constitutionally detained
9 under 8 U.S.C. § 1231 consistent with the statute's basic purpose of effectuating removal.
10 In fact, he is mandatorily detained under 8 U.S.C. § 1231(a)(1)(A) because he is within the
11 statutorily proscribed 90-day removal period.

12 Petitioner confuses the issues and focuses on the status of removals to Ukraine,
13 claiming that Petitioner has no reasonable likelihood of removal there, an issue not before
14 this Court. This response is supported by the following Memorandum of Points and
15 Authorities and exhibits.

16 **MEMORANDUM OF POINTS AND AUTHORITIES**

17 **I. Factual and Procedural Background.**

18 Petitioner is citizen and national of Ukraine. *See* Declaration of Fernando
19 Valenzuela, Assistant Field Office Director, attached as Exhibit A, at ¶ 6. Petitioner arrived
20 in the United States on September 1, 2024, at Los Angeles International Airport and was
21 paroled under the Uniting for Ukraine (U4U) parole program. *Id.* at ¶ 8. He was then
22 paroled into the United States pursuant to INA § 212(d)(5) (providing for parole for urgent
23 humanitarian reasons and significant public benefit) on the basis of his having been pre-
24 approved for the Uniting for Ukraine (U4U) parole program.¹ *Id.* DHS thereafter issued
25 him an Employment Authorization Document (EAD) in October 2024. *Id.* He was not

26
27 ¹ The U4U parole program was created in April 2022 to allow Ukrainian citizens and their
28 immediate family members outside of the United States to be pre-approved to enter the
United States on a parole for a two-year period. Further information about the now-
suspended U4U parole program is available via an archived web page located at
<https://www.dhs.gov/archive/uniting-ukraine> (accessed on Aug. 28, 2025).

1 issued any travel documents in connection with the parole, nor did his U4U parole entitle
2 him to depart and then re-enter the United States. *Id.* The U4U program was, along with
3 all the other categorical parole programs, suspended by DHS following the promulgation
4 of Executive Order 14165, *Securing Our Borders*, on January 20, 2025. *Id.* at ¶ 9.

5 On February 26, 2025, Petitioner departed the United States for Mexico. *Id.* at ¶ 10.
6 Prior to that departure, he did not apply for, and was not issued, an advance authorization
7 to travel to the United States without a visa (*i.e.*, an advance parole document). *See* 8 C.F.R.
8 § 212.5(f) (“When parole is authorized for an alien who will travel to the United States
9 without a visa, the alien shall be issued an appropriate document authorizing travel.”). *Id.*
10 at ¶ 10. Petitioner’s departure from the United States automatically terminated his U4U
11 parole pursuant to 8 C.F.R. § 212.5(e)(1)(i) (“Parole shall be automatically terminated
12 without written notice ... upon the departure from the United States of the alien[.]” *Id.* at ¶
13 11. After effecting his departure from the United States, Petitioner applied for admission
14 to the United States at the San Ysidro Port of Entry on February 26, 2025. *Id.* at ¶ 12. He
15 produced a photograph of his DHS-issued EAD, which is not a valid entry document. *Id.*
16 at ¶ 12. Because Petitioner is an immigrant not in possession of a valid entry document at
17 the time of his application for admission, he has been determined to be inadmissible under
18 INA § 212(a)(7)(A)(i)(I). *Id.* at ¶ 13. On February 24, 2025, Petitioner was processed for
19 expedited removal. *Id.* at ¶ 14. A sworn statement was not taken at that time. *Id.*

20 On February 26, 2025, Petitioner was issued a notice and order of expedited removal
21 (Form I-860). *Id.* at ¶ 15. The administrative record in that expedited removal proceeding
22 did not include Form I-867A (*Record of Sworn Statement in Proceedings under Section*
23 *235(b)(1) of the Act*) and 867B (*Jurat for Record of Sworn Statement*). *Id.* Petitioner
24 requested a bond hearing in March 2025. *Id.* at ¶ 16. The Immigration Judge (IJ) denied
25 his bond request on March 14, 2025, for lack of jurisdiction because he was subject to
26 mandatory detention without a bond hearing under 8 U.S.C. § 1225(b). *Id.* On August 22,
27 2025, Enforcement and Removal Operations (ERO) preliminarily interviewed Petitioner
28 to discuss whether he had a fear of persecution or torture in the event of his removal from

1 the United States. *Id.* at ¶ 17. This had not been asked of him at the time of his application
2 for admission and in the expedited removal proceedings that immediately followed. *Id.* In
3 response to questioning, Petitioner did not expressly claim fear, but rather, asked ERO how
4 long he would be detained in the event that he claimed fear. *Id.* at ¶ 18. He also indicated
5 that he wished to consult with an unnamed attorney concerning whether he has a fear of
6 persecution or torture. *Id.* Petitioner also reiterated his desire to be released from custody
7 to Los Angeles, California or, in the alternative, to be removed to Germany. *Id.*

8 The administrative record of proceedings associated with the February 26, 2025,
9 expedited order of removal did not appear to be in compliance with the requirements of 8
10 C.F.R. § 235.3 which provides that, among other things, the examining immigration officer
11 shall create a record of the facts of the case and statements made by an alien processed for
12 expedited removal on Forms I-867A (*Record of Sworn Statement in Proceedings under*
13 *Section 235(b)(1) of the Act*) and 867B (*Jurat for Record of Sworn Statement*). 8 C.F.R. §
14 235.3(b)(2)(i). *Id.* at ¶ 19. ERO elected to re-process Petitioner for expedited removal
15 pursuant to INA § 235(b)(1)(A). *Id.* at ¶ 20. Accordingly, Petitioner was re-interviewed by
16 ERO on August 24, 2025, in connection with his re-processing for expedited removal. *Id.*
17 at ¶ 21. During that interview, Petitioner stated that he did not fear persecution or torture if
18 removed from the United States. *Id.* He expressed a desire to be released into the United
19 States or, in the alternative, to be removed to Germany. *Id.* Petitioner refused to provide
20 ERO with a sworn statement during re-processing for expedited removal. *Id.* at ¶ 22. ERO
21 nevertheless prepared Forms I-867A and I-867B for the administrative record of
22 proceedings associated with the expedited removal proceedings commenced on August 24,
23 2025, as required by 8 C.F.R. § 235.3(b)(2)(i). *Id.* On August 28, 2025, Petitioner was
24 issued a valid executable final administrative order of expedited removal. *Id.* at ¶ 23.

25 Petitioner filed a habeas action asserting several causes of action, including that he
26 was never referred for a credible fear interview, that his detention violates 8 U.S.C. §
27 1231(a)(6) because the 90-day statutory removal period expired stating that expedited
28 removal proceedings have “probably concluded” (Doc. 1 at ¶ 21(b)), and that his detention

1 violates his due process rights because he contends that he cannot currently be removed to
2 Ukraine. Doc. 1. Petitioner filed a Motion for Preliminary Injunction and Temporary
3 Restraining Order (PI/TRO) (Doc. 3) on August 14, 2025, asking that this Court order his
4 immediate release from custody. Doc. 3 at 2. Because Petitioner is not likely to succeed on
5 the merits of any of these claims, the PI/TRO motion should be denied.

6 **II. TEMPORARY RESTRAINING ORDERS AND PRELIMINARY** 7 **INJUNCTIONS STANDARD.**

8 The substantive standard for issuing a temporary restraining order is identical to the
9 standard for issuing a preliminary injunction. *See Stuhlberg Int'l Sales Co. v. John D.*
10 *Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). An injunction is a matter of equitable
11 discretion and is “an extraordinary remedy that may only be awarded upon a clear showing
12 that the plaintiff is entitled to such relief.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S.
13 7, 22 (2008). Preliminary injunctions are “never awarded as of right.” *Id.* at 24.

14 Preliminary injunctions are intended to preserve the relative positions of the parties
15 until a trial on the merits can be held, “preventing the irreparable loss of a right or
16 judgment.” *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir.
17 1984). Preliminary injunctions are “not a preliminary adjudication on the merits.” *Id.* A
18 court should not grant a preliminary injunction unless the applicant shows: (1) a strong
19 likelihood of his success on the merits; (2) that the applicant is likely to suffer an irreparable
20 injury absent preliminary relief; (3) the balance of hardships favors the applicant; and (4)
21 the public interest favors a preliminary injunction. *Winter*, 555 U.S. at 20. To show harm,
22 a movant must allege that concrete, imminent harm is likely with particularized facts. *Id.*
23 at 22. Where the government is a party, courts merge the analysis of the final two *Winter*
24 factors, the balance of equities and the public interest. *Drakes Bay Oyster Co. v. Jewell*,
25 747 F.3d 1073, 1092 (9th Cir. 2014) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)).
26 Alternatively, a plaintiff can show that there are “‘serious questions going to the merits’
27 and the ‘balance of hardships tips sharply towards’ [plaintiff], as long as the second and
28 third *Winter* factors are [also] satisfied.” *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d
848, 856 (9th Cir. 2017) (citing *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-

35 (9th Cir. 2011)). “[P]laintiffs seeking a preliminary injunction face a difficult task in proving that they are entitled to this ‘extraordinary remedy.’ *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010). Petitioner’s carries a “heavy” burden. *Id.*

A preliminary injunction can take two forms. A “prohibitory injunction prohibits a party from taking action and preserves the status quo pending a determination of the action on the merits.” *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878-79 (9th Cir. 2009) (cleaned up). A “mandatory injunction orders a responsible party to take action. . . . A mandatory injunction goes well beyond simply maintaining the status quo pendente lite and is particularly disfavored.” *Id.* at 879 (cleaned up). A mandatory injunction is “subject to a higher degree of scrutiny because such relief is particularly disfavored under the law of this circuit.” *Stanley v. Univ. of S. California*, 13 F.3d 1313, 1320 (9th Cir. 1994) (citation omitted). The Ninth Circuit has warned courts to be “extremely cautious” when issuing this type of relief, *Martin v. Int’l Olympic Comm.*, 740 F.2d 670, 675 (9th Cir. 1984), and requests for such relief are generally denied “unless extreme or very serious damage will result,” and even then, not in “doubtful cases.” *Marlyn Nutraceuticals, Inc.*, 571 F.3d at 879; accord *LGS Architects, Inc. v. Concordia Homes of Nevada*, 434 F.3d 1150, 1158 (9th Cir. 2006); *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015). In such cases, district courts should deny preliminary relief unless the facts and law *clearly* favor the moving party. *Garcia*, 786 F.3d at 740 (emphasis in original).

III. DETENTION STANDARD GOVERNING ALIENS ORDERED REMOVED.

The detention, release, and removal of aliens subject to a final order of removal is governed by § 241 of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1231. Pursuant to INA § 241(a), the Attorney General has 90 days to remove an alien from the United States after an order of removal becomes final. During this “removal period,” detention of the alien is mandatory. *Id.* After the 90-day period, if the alien has not been removed and remains in the United States, his detention may be continued, or he may be released under the supervision of the Attorney General. INA § 241, 8 U.S.C. §§ 1231(a)(3) and (6). Under this section, ICE may detain an alien for a “reasonable time” necessary to

1 effectuate the alien's deportation. INA § 241(a), 8 U.S.C. § 1231(a). However, indefinite
2 detention is not authorized. *Id.* The Immigration and Nationality Act (INA) further
3 provides that aliens who are inadmissible under 8 U.S.C. § 1182 may be detained beyond
4 the 90-day period pending removal. *See* 8 U.S.C. § 1231(a)(6); 8 C.F.R. § 241.4(a)(1), (4).

5 Petitioner cites to *Zadvydas v. Davis*, 533 U.S. 678 (2001), several times in his
6 Petition. Doc. 1 at 7, 10-13. *Zadvydas* places the burden on the alien to show, after a
7 detention period of six months, that there is "good reason to believe that there is no
8 significant likelihood of removal in the reasonably foreseeable future." *Id.* at 701. If the
9 alien makes that showing, the Government must then introduce evidence to refute that
10 assertion to keep the alien in custody. *See id.*; *see also Xi v. I.N.S.*, 298 F.3d 832, 839-40
11 (9th Cir. 2002). The Court must "ask whether the detention in question exceeds a period
12 reasonably necessary to secure removal. It should measure reasonableness primarily in
13 terms of the statute's basic purpose, namely, assuring the alien's presence at the moment
14 of removal. Thus, if removal is not reasonably foreseeable, the court should hold continued
15 detention unreasonable and no longer authorized by statute." *Zadvydas*, 533 U.S. at 699.
16 That *Zadvydas* analysis is inapplicable in this case.

17 **A. Petitioner's Detention is Lawful and Constitutionally Permitted.**

18 Petitioner is detained pursuant to a valid executable final administrative order of
19 expedited removal dated August 28, 2025. Ex. A at ¶ 22. As such, the Attorney General
20 has 90 days to remove him from the United States after his order of removal became final,
21 which began running on August 28, 2025 (yesterday). On February 26, 2025, Petitioner
22 departed the United States for Mexico, which automatically terminated his U4U parole 8
23 C.F.R. § 212.5(e)(1)(i) ("Parole shall be automatically terminated without written notice
24 ... upon the departure from the United States of the alien[.]" *Id.* at ¶¶ 10-11. He was
25 subsequently processed for expedited removal and issued a notice and order of expedited
26 removal (Form I-860). *Id.* at ¶¶ 14-15.

27 Contrary to any arguments made in the Petition alleging that Petitioner was "never
28 referred for a credible fear interview as required by 8 C.F.R. § 235.3(b)(4)(i)," (Doc. 1 at

¶ 22), ERO preliminarily interviewed Petitioner to discuss whether he had a fear of persecution or torture in the event of his removal from the United States on August 22, 2025. *Id.* at ¶ 17. Tellingly, Petitioner did not expressly claim fear, but rather, asked ERO how long he would be detained in the event that he claimed fear, and indicated that he wished to consult with an unnamed attorney concerning whether he has a subjective fear of persecution or torture if removed, while reiterating his desire to be released from custody to Los Angeles, California or, in the alternative, to be removed to Germany. *Id.* at ¶ 18.

Upon reviewing 8 C.F.R. § 235.3, ERO elected to re-process Petitioner for expedited removal pursuant to INA § 235(b)(1)(A). *Id.* at ¶¶ 19-20. Petitioner was re-interviewed by ERO on August 24, 2025, in connection with his re-processing for expedited removal. *Id.* at ¶ 21. During that interview, Petitioner stated that he did not fear persecution or torture if removed from the United States, and he expressed a desire to be released into the United States or, in the alternative, to be removed to Germany. *Id.*

As such, Petitioner is subject to a valid executable final administrative order of expedited removal date August 28, 2025. *Id.* at ¶ 23.

B. Petitioner is Mandatorily Detained.

Addressed above, the detention of aliens subject to a final order of removal is governed by § 241 of the INA, 8 U.S.C. § 1231. Pursuant to INA § 241(a), the Attorney General has 90 days to remove an alien from the United States after an order of removal becomes final. During this “removal period,” detention of the alien is mandatory. *Id.*

Petitioner began his 90-day mandatory detention period yesterday, August 28, 2025, when he received a valid final order of expedited removal following his failed fear claims. Ex. A at ¶¶ 17-18, 21, 23. Petitioner half-heartedly argues that his removal order became final “sometime in March 2025,” in his Petition, while contesting its finality based on lacking a credible fear interview (Doc. 1 at ¶ 24(b)). ERO elected to re-process Petitioner for expedited removal upon reviewing the administrative record of proceedings associated with Petitioner’s February 26, 2025, expedited order of removal. *Id.* at ¶¶ 18-19. Petitioner was subsequently afforded two opportunities to express a fear of persecution or torture if

1 removed from the United States in August 2025, and he did not express a fear of either
2 both times. *Id.* at ¶¶ 17-18, 21. Following those interviews, he was validly issued a final
3 order of expedited removal on August 28, 2025. *Id.* at ¶ 23. He has 89 days left in his
4 mandatory detention period.

5 The analysis governing reasonable likelihood of removal as outlined under
6 *Zadvydas* only applies when the alien has been detained past the six-month presumptive
7 mark. *Zadvydas* places the burden on the alien to show, after a detention period of six
8 months, that there is “good reason to believe that there is no significant likelihood of
9 removal in the reasonably foreseeable future.” *Id.* at 701. Petitioner is not there yet. His
10 clock started running yesterday, so the six-month analysis is premature, and not an issue
11 before this Court. Only then, if the alien makes that showing, which Petitioner cannot, the
12 Government must then introduce evidence to refute that assertion to keep the alien in
13 custody. *See id.*; *see also Xi v. I.N.S.*, 298 F.3d 832, 839-40 (9th Cir. 2002). The Court must
14 “ask whether the detention in question exceeds a period reasonably necessary to secure
15 removal. It should measure reasonableness primarily in terms of the statute’s basic purpose,
16 namely, assuring the alien’s presence at the moment of removal.

17 Based on the above, Petitioner is mandatorily detained, and the *Zadvydas* analysis
18 governing likelihood of removal is inapplicable.

19 **IV. A PRELIMINARY INJUNCTION IS NOT WARRANTED.**

20 A “preliminary injunction is an extraordinary and drastic remedy.” *Munaf v. Geren*,
21 553 U.S. 674, 689-90 (2008). A district court should enter a preliminary injunction only
22 “upon a clear showing that the [movant] is entitled to such relief.” *Winter v. Natural*
23 *Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008). As the Supreme Court has
24 articulated, “[a] stay is not a matter of right, even if irreparable injury might otherwise
25 result” but is instead an exercise of judicial discretion that depends on the particular
26 circumstances of the case. *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quoting *Virginian R.*
27 *Co. v. United States*, 272 U.S. 658, 672 (1926)).

28 **A. Plaintiff Cannot Establish a Likelihood of Success on the Merits.**

1 For all the reasons argued above, Petitioner cannot establish a likelihood of success
2 on the merits of his habeas petition. His petition is prematurely focused on the war between
3 Ukraine and Russia, and that any suggestion of removal there would not likely occur in the
4 foreseeable future. Petitioner is mandatorily detained well-within the 90 days as addressed
5 above. He was re-processed for expedited removal earlier this month. Ex. A at ¶ 20. As
6 part of that process, he was afforded two chances to express fear of persecution or torture,
7 and he did not expressly claim fear in either interview. *Id.* at ¶¶ 17-18, 21-22.

8 Therefore, Petitioner is unlikely to succeed on the merits of his habeas claim and is
9 not entitled to injunctive relief—particularly regarding his request for “immediate release,”
10 which would directly violate 8 U.S.C. § 1231. For these reasons, the Court should deny
11 Petitioner’s request for injunctive relief.

12 **B. Plaintiff Cannot Establish Irreparable Harm.**

13 The only claim Petitioner makes with respect to irreparable harm is that his “illegal
14 confinement is quintessentially irreparable harm.” Doc. 3 at 2. To show harm, a movant
15 must allege that concrete, imminent harm is likely with particularized facts. *Winter*, 555
16 U.S. at 22. Petitioner is one day into his 90-day mandatory period following his executable
17 final administrative order dated August 28, 2025. Ex. A at ¶ 32. Petitioner cannot show
18 irreparable harm as he is currently lawfully and mandatorily detained.

19 **C. The Public Interest and Balance of the Equities Favors the Government.**

20 Where the Government is the opposing party, the balance of equities and public
21 interest factors merge. *Nken*, 556 U.S. at 435. Where the Government is the opposing party,
22 courts “cannot simply assume that ordinarily, the balance of hardships will weigh heavily
23 in the applicant’s favor.” *Id.* at 436 (citation and internal quotation marks omitted). Here,
24 the public interest weighs in favor of denying the motion for a preliminary injunction.
25 “Control over immigration is a sovereign prerogative.” *El Rescate Legal Servs., Inc. v.*
26 *Exec. Office of Immigration Review*, 959 F.2d 742, 750 (9th Cir. 1992). The public interest
27 lies in the Executive’s ability to enforce U.S. immigration laws and to keep convicted
28 criminal aliens detained pending execution of their removal orders. Here, Petitioner is

1 beginning his 90-day mandatory detention period following a recently issued expedited
2 removal order. The public interest lies in keeping Petitioner mandatorily detained in order
3 to effectuate removal which is the undergirding statutory purpose of 8 U.S.C. § 1231.

4 **V. CONCLUSION.**

5 For the reasons set forth in this Response, the Motion for Temporary Restraining
6 Order and a Preliminary Injunction should be denied.

7 Respectfully submitted on August 29, 2025.

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