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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Pavlo Malitskyi,

Petitioner,

v.

David R. Rivas, *et al.*,

Respondents.

No. CV-25-02929-PHX-MTL(JFM)

RESPONDENT'S ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS UNDER 28 § U.S.C. 2241

Respondents David R. Rivas, Warden, San Luis Regional Detention Center; Gregory J. Archambeault, San Diego Field Director, U.S. Immigration and Customs Enforcement, Kristi Noem, Secretary of Department of Homeland Security (DHS), and Pam Bondi, Attorney General of the United States (Respondents), through undersigned counsel, respond to Petitioner Pavlo Malitsky's Petition for Writ of Habeas Corpus under 28 U.S.C. § 2241. The Court should deny the petition because Petitioner is properly and mandatorily detained under 8 U.S.C. § 1231 pursuant to a valid executable final administrative order of expedited removal dated August 28, 2025. The required ninety-day detention period does not expire until November 26, 2025. Petitioner did not express fear of persecution or torture when interviewed on August 22, 2025, and August 24, 2025. This response is supported by the following Memorandum of Points and Authorities and exhibit.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Factual and Procedural Background.

Respondent reproduces below the facts and procedural history contained in its Response filed in Opposition to Petitioner's Request for a Temporary Restraining Order/Preliminary Injunction and attaches the same exhibit. (Doc. 10).

Petitioner is citizen and national of Ukraine. *See* Declaration of Fernando Valenzuela, Assistant Field Office Director, attached as Exhibit A, at ¶ 6. Petitioner arrived in the United States on September 1, 2024, at Los Angeles International Airport and was paroled under the Uniting for Ukraine (U4U) parole program. *Id.* at ¶ 8. He was then paroled into the United States pursuant to INA § 212(d)(5) (providing for parole for urgent humanitarian reasons and significant public benefit) based on his having been pre-approved for the Uniting for Ukraine (U4U) parole program.[1] *Id.* DHS thereafter issued him an Employment Authorization Document (EAD) in October 2024. *Id.* He was not issued any travel documents in connection with the parole, nor did his U4U parole entitle him to depart and then re-enter the United States. *Id.* The U4U program was, along with all the other categorical parole programs, suspended by DHS following the promulgation of Executive Order 14165, *Securing Our Borders*, on January 20, 2025. *Id.* at ¶ 9.

On February 26, 2025, Petitioner departed the United States for Mexico. *Id.* at ¶ 10. Prior to that departure, he did not apply for, and was not issued, an advance authorization to travel to the United States without a visa (*i.e.*, an advance parole document). *See* 8 C.F.R. § 212.5(f) ("When parole is authorized for an alien who will travel to the United States without a visa, the alien shall be issued an appropriate document authorizing travel."). *Id.* at ¶ 10. Petitioner's departure from the United States automatically terminated his U4U parole pursuant to 8 C.F.R. § 212.5(e)(1)(i) ("Parole shall be automatically terminated

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[1] The U4U parole program was created in April 2022 to allow Ukrainian citizens and their 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).

without written notice … upon the departure from the United States of the alien[.]" *Id.* at ¶ 11. After effecting his departure from the United States, Petitioner applied for admission to the United States at the San Ysidro POE on February 26, 2025. *Id.* at ¶ 12. He produced a photograph of his DHS-issued EAD, which is not a valid entry document. *Id.* at ¶ 12. Because Petitioner is an immigrant not in possession of a valid entry document at the time of his application for admission, he has been determined to be inadmissible under INA § 212(a)(7)(A)(i)(I). *Id.* at ¶ 13. On February 24, 2025, Petitioner was processed for expedited removal. *Id.* at ¶ 14. A sworn statement was not taken at that time. *Id.*

On February 26, 2025, Petitioner was issued a notice and order of expedited removal (Form I-860). *Id.* at ¶ 15. The administrative record in that expedited removal proceeding did not include Form I-867A (*Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act*) and 867B (*Jurat for Record of Sworn Statement*). *Id.* Petitioner requested a bond hearing in March 2025. *Id.* at ¶ 16. The Immigration Judge (IJ) denied his bond request on March 14, 2025, for lack of jurisdiction because he was subject to mandatory detention without a bond hearing under 8 U.S.C. § 1225(b). *Id.* On August 22, 2025, Enforcement and Removal Operations (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. *Id.* at ¶ 17. This had not been asked of him at the time of his application for admission and in the expedited removal proceedings that immediately followed. *Id.* In response to questioning, Petitioner did not expressly claim fear, but rather, asked ERO how long he would be detained if he claimed fear. *Id.* at ¶ 18. He also indicated that he wished to consult with an unnamed attorney concerning whether he has a subjective fear of persecution or torture. *Id.* Petitioner also reiterated his desire to be released from custody to Los Angeles, California or, in the alternative, to be removed to Germany. *Id.*

The administrative record of proceedings associated with the February 26, 2025, expedited order of removal does not appear to be in compliance with the requirements of 8 C.F.R. § 235.3 which provides that, among other things, the examining immigration officer shall create a record of the facts of the case and statements made by an alien

processed for expedited removal on Forms I-867A (*Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act*) and 867B (*Jurat for Record of Sworn Statement*). 8 C.F.R. § 235.3(b)(2)(i). *Id.* at ¶ 19. ERO elected to re-process Petitioner for expedited removal pursuant to INA § 235(b)(1)(A). *Id.* at ¶ 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. *Id.* He expressed a desire to be released into the United States or, in the alternative, to be removed to Germany. *Id.* Petitioner refused to provide ERO with a sworn statement during re-processing for expedited removal. *Id.* at ¶ 22. ERO nevertheless prepared Forms I-867A and I-867B for the administrative record of proceedings associated with the expedited removal proceedings commenced on August 24, 2025, as required by 8 C.F.R. § 235.3(b)(2)(i). *Id.* On August 28, 2025, Petitioner was issued a valid executable final administrative order of expedited removal. *Id.* at ¶ 23.

The U.S. Attorneys' Office for the District of Arizona was served with a copy of the Summons and Petition on August 21, 2025, making its 20-day response deadline September 10, 2025. Petitioner's habeas action asserts several causes of action, including that Defendants did not refer him for a credible fear interview, that his detention violates 8 U.S.C. § 1231(a)(6) because the 90-day statutory removal period expired on an unknown date claiming that his expedited removal proceedings have "probably concluded" (Doc. 1 at ¶ 21(b)), and that his detention violates his due process rights because he contends that he cannot currently be removed to Ukraine because he was allegedly told that "he will not be removed until the war is over and the airports in Ukraine have reopened." Doc. 1 at 10. Respondents answer grounds one through three separately below.

II. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 12(b)(1), a court may grant a motion to dismiss for lack of subject matter jurisdiction. *Tosco Corp. v. Cmtys. for a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001). When subject matter jurisdiction is challenged under

Rule 12(b)(1), the plaintiff has the burden of proving jurisdiction to survive the motion. *Id.* (citing *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989)).

A court may grant a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted. To survive a motion to dismiss for failure to state a claim, the plaintiff must plead facts sufficient to "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). On a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286, (1986). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

III. Detention Standard Governing Aliens Pending Removal.

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

In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court defined six months as a presumptively reasonable period of detention. *Zadvydas* places the burden on the alien to show, after a detention period of six months, that there is "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.* at 701. If the alien makes that showing, the Government must then introduce evidence to

refute that assertion to keep the alien in custody. *See id.*; *see also Xi v. I.N.S.*, 298 F.3d 832, 839-40 (9th Cir. 2002). The 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." *Zadvydas*, 533 U.S. at 699. Petitioner has the burden to show that his removal is not likely in the reasonably foreseeable future. *Zadvydas*, 533 U.S. at 701.

Only then does the burden shift to the Government to show that removal is substantially likely in the reasonably foreseeable future. *Id.* In *Zadvydas*, the Supreme Court designated six months as a presumptively reasonable period of time to allow the government to remove an alien detained under 8 U.S.C. § 1231(a)(6), but an alien is not entitled to release after six months detention. *Id.* at 701 ("This 6-month presumption, of course, *does not mean that every alien not removed must be released after six months*. To the contrary, an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.") (emphasis added). The passage of time alone is insufficient to establish that no substantial likelihood of removal exists in the reasonably foreseeable future. *Lema v. I.N.S.*, 214 F. Supp. 2d 1116, 1118 (W.D. Wash. 2002). In *Lema,* where the petitioner had been detained for more than a year, the district court held that the passage of time was only the first step in the analysis, and that the petitioner must then provide good reason to believe that no significant likelihood of removal exists in the reasonably foreseeable future. *Id.*

IV. The Habeas Petition Should Be Denied.

A. Petitioner's detention does not violate his due process rights.

Petitioner's primary claim under Ground One is that his detention violates his due process rights under the Fifth Amendment because (1) he claims he cannot be presently returned to Ukraine, and (2) his detention period violates *Zadvydas.* Doc. 1 at 10.

Petitioner's allegations are premature and detached from the facts. The status of

whether Petitioner can be presently returned to Ukraine based on the war with Russia is not an issue before this Court. Petitioner is detained pursuant to a valid executable final administrative order of expedited removal dated August 28, 2025. Ex. A at ¶ 22. As such, the Attorney General has 90 days to remove him from the United States after his order of removal became final, which began running on August 28, 2025. The ninety-day deadline would expire on November 26, 2025.[2]

On February 26, 2025, Petitioner departed the United States for Mexico, which automatically terminated is U4U parole 8 C.F.R. § 212.5(e)(1)(i) ("Parole shall be automatically terminated without written notice … upon the departure from the United States of the alien[.]" *Id.* at ¶¶ 10-11. He was subsequently processed for expedited removal and issued a notice and order of expedited removal (Form I-860). *Id* at ¶¶ 14-15. 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. Therefore, Petitioner is subject to a valid executable final administrative order of expedited removal date August 28, 2025, and his detention does not violate his due process rights, and the analysis as to whether he can be presently removed to Ukraine is premature. *Id.* at ¶ 23.

B. Petitioner's two fear interviews yielded negative results.

Under Ground Two, Petitioner claims that his due process rights have been violated because he has not been afforded the opportunity to contest removal to any third country through deferral or withholding of removal to that country under either statute or the Convention Against Torture (CAT). Doc. 1 at 11. For the same reasons addressed above, Petitioner's claims under Ground Two are similarly premature and predicated on the faulty assumption that Petitioner is detained violative of *Zadvydas*

Regardless, Petitioner has failed to state a valid due process allegation. Contrary to his claims that he was "never referred for a credible fear interview as required by 8 C.F.R.

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[2] That expiration date does not include that the INA provides that aliens who are inadmissible under 8 U.S.C. § 1182 may be detained beyond the 90-day period pending removal. *See* 8 U.S.C. § 1231(a)(6); 8 C.F.R. § 241.4(a)(1), (4). Additionally, *Zadvydas* defined six months as a presumptively reasonable period of detention. *Id.* at 701.

§ 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. Ex. A at ¶ 17. As addressed in Respondents' Response in Opposition to Petitioner's Request for a Temporary Restraining Order and Preliminary Injunction, (Doc. 10 at 7), Petitioner responded in a telling manner. Specifically, 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. ERO re-interviewed Petitioner 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.* To the extent Petitioner seeks to compel the government to afford him certain procedures under the expedited removal statute and regulations, there can be no dispute that he has now received those procedures, and that Petitioner no longer has any "legally cognizable interest in the outcome" of her claims, *Murphy*, 455 U.S. at 481, or "any effective relief that can be granted by the court." *Branch v. Newsom*, 38 F.4th 6, 11 (9th Cir. 2022) (en banc). As such, Petitioner's detainment is proper, his due process rights have not been violated, and his claims are raised under Ground Two are moot.

C. Respondents have not failed to follow any regulations that would rise to a due process violation.

Under Ground Three, Petitioner conclusory claims that Respondents failed to provide the Petitioner with periodic custody reviews under 8 C.F.R. §§ 241.4 and 241.13, violating his due process rights without factual support. Doc. 1 at 12. 8 C.F.R. § 241.4

applies to continued detention of aliens beyond the removal period. Under 8 C.F.R. § 241.4(g)(1)(i)(A), the removal period for an alien subject to a final order of removal begins running the date the order becomes administratively final. As Petitioner notes, the reviews are "aimed at safeguarding . . . . against indefinite detention." Doc. 1 at 12. The facts do not support that Petitioner has been or will be indefinitely detained. 8 C.F.R. § 241.13 concerns the determination of whether there is a significant likelihood of removing a detained alien in the reasonably foreseeable future, and Petitioner is presently mandatorily detained under 8 U.S.C. § 1231 well-within the 90 days.

Additionally, Petitioner attempts to challenge the constitutionality of 8 U.S.C. § 1231(a)(6) in Ground Three. As Petitioner has failed established that he has been detained in violation of his due process rights, or that the Respondents have violated 8 C.F.R. §§ 241.4 and 241.13, he lacks standing to challenge whether 8 U.S.C. § 1231(a)(6) conflicts with fundamental precepts of due process.

V. CONCLUSION

For the foregoing reasons, Respondents respectfully request this Court deny Petitioner's Writ of Habeas Corpus and dismiss this case.

Respectfully submitted on September 10, 2025.

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