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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Pavlo Malitskyi,

Petitioner,

vs.

David R. Rivas, Warden, et al.,

Respondents.

No. 2:25-cv-2929-PHX-MTL (JFM)

Reply in Support of Petition for a Writ of Habeas Corpus and Motions for a Preliminary Injunction and Temporary Restraining Order

Mr. Malitskyi has been in immigration detention for over six months. Respondents have not shown that there is any likelihood that Mr. Malitskyi will be removed to Ukraine in the reasonably foreseeable future. Indeed, the government has elsewhere admitted that removals to Ukraine are presently impossible on account of the war with Russia. *See* Response to Petitioner's Motion for an Immediate Ruling on Preliminary Injunction, *Serbenyuk v. Rivas*, No. 2:25-cv-2082-PHX-MTL (MTM) (D. Ariz. filed Aug. 20, 2025) (Dkt. #22). The government has no evidence to show that it gave Mr. Malitskyi notice of and an opportunity to contest respondents' efforts to remove him to Moldova. And respondents have admitted that they have never conducted any required custody reviews—just as Mr. Malitskyi alleged in his petition. This Court should grant the petition and order his immediate release from respondents' custody.

Background

When Mr. Malitskyi initiated this habeas corpus proceeding, he filed a motion for limited discovery (Dkt. #4) along with the petition itself (Dkt. #1) and a motion for a preliminary

injunction and a temporary restraining order (Dkt. #3). When the Court ordered a response to the petition and preliminary motion, it granted the discovery motion. (Dkt. #7 at 2–3) On September 2, 2025, the government provided some documents that were responsive to Mr. Malitskyi's discovery request—to wit, what it said is his entire A-file, consisting of 77 pages—and denied that respondents had any other documents that were responsive to his request.[1] Upon review of the discovery that the government has produced, Mr. Malitskyi confirms that that background factual allegations set forth in his petition are largely consistent with the discovery. (The main discrepancy is the date of Mr. Malitskyi's arrest at the San Ysidro Port of Entry, which he accepts as being February 26, 2025, as indicated in his A-file.) Here, Mr. Malitskyi will add additional information found in his A-file before addressing the government's legal arguments against his claims for relief.

Mr. Malitskyi came to the United States in 2024 under the Uniting for Ukraine program, which granted humanitarian parole to Ukrainians who were displaced as a result of the war with Russia. (DHS-4) He was given a work authorization and began working as a delivery driver with UberEats. On February 26, 2025, he was making a delivery in the San Diego area when he got lost. He found himself in Mexico, but immediately turned around and tried to reenter the United States at the San Ysidro Port of Entry. Border Patrol agents arrested him, and he has been in immigration custody ever since.

As Mr. Malitskyi has explained, once he set foot outside of the United States—even a short distance outside, and even for the short period of time that he did—his humanitarian parole automatically terminated. (Dkt. #1 at 5 ¶ 20) On February 26, agents of ICE and the Border Patrol thus treated Mr. Malitskyi as an applicant for admission to the United States. *See* 8 U.S.C. § 1225(a)(1). The agents determined that he was inadmissible to the United States because he

[1] Along with this document, Mr. Malitskyi is filing for the record the documents he received from the Department of Homeland Security pursuant to the Court's discovery order. This filing, consisting of a single pdf document of 77 pages, will be submitted separately under seal, and a table of contents will be made available for the public docket. The documents will be referenced as "DHS-xxx," where xxx is the pdf page of the filing.

presented himself at a port of entry without valid entry documents. *See* 8 U.S.C. § 1182(a)(7)(A)(i)(I). Based on this determination, ICE placed him in expedited removal proceedings and, because Mr. Malitskyi did not, in their view, express a fear of returning to Ukraine, ordered him removed to that country. (DHS-60) *See* 8 U.S.C. § 1225(b)(1)(A)(i). That removal order triggered mandatory detention until he is removed from the United States. *See* 8 U.S.C. § 1225(b)(1)(B)(iii)(IV). He was ultimately transferred to the San Luis Regional Detention Facility in San Luis, Arizona.

On March 14, 2025, Mr. Malitskyi appeared before an immigration judge in Otay Mesa, California. He was asking for custody redetermination. An immigration judge refused to entertain his request because Mr. Malitskyi was not in formal removal proceedings, *see generally* 8 U.S.C. § 1229a, and the judge thus ruled that he lacked jurisdiction to reevaluate Mr. Malitskyi's custody status. (DHS-76)

Mr. Malitskyi's A-file contains copies of a number of his identity documents: his California driver's license, California benefits identification card, and his MediCal card (DHS-42); his Ukrainian passport (DHS-64); and his Moldovan identity card (DHS-65). On May 29, 2025, the Moldovan consulate informed ICE that Moldova would not issue a travel document to Mr. Malitskyi. (DHS-57) The government has no evidence that respondents ever notified Mr. Malitskyi that they sought to remove him to Moldova, nor does it have any evidence that they gave Mr. Malitskyi an opportunity to request relief from removal to Moldova.

On August 14, 2025, Mr. Malitskyi filed the habeas petition that initiated these proceedings. (Dkt. #1) Six days later, the government informed this Court, in another case involving a Ukrainian citizen in immigration detention, that removals to Ukraine were not presently possible. "Given the international developments with respect to removals to Ukraine, the United States cannot successfully remove Petitioner there at the time of this filing." Response to Petitioner's Motion for an Immediate Ruling on Preliminary Injunction at 3, *Serbenyuk v. Rivas*, No. 2:25-cv-2082-PHX-MTL (MTM) (D. Ariz. filed Aug. 20, 2025) (Dkt. #22). "Because Petitioner can now establish that there is no significant likelihood of removal to

Ukraine in the reasonably foreseeable future, he is entitled to release under" *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001). *Id.* This Court accordingly ordered that the petitioner in that other case be released from custody. *See* Order, *Serbenyuk v. Rivas*, No. 2:25-cv-2082-PHX-MTL (MTM) (D. Ariz. Aug. 20, 2025) (Dkt. #24).

Even though the government had admitted to this Court that it could not remove *anyone* to Ukraine, two days later respondents nevertheless pressed on with their efforts to remove Mr. Malitskyi to that country. Two deportation officers interviewed Mr. Malitskyi with the assistance of a Russian interpreter (Russian is Mr. Malitskyi's preferred language). (DHS-72) They were belatedly attempting to ascertain whether Mr. Malitskyi had any fear of returning to Ukraine. (DHS-72) ICE did not make this attempt when Mr. Malitskyi was arrested on February 26—which is required by statute, *see* 8 U.S.C. § 1225(b)(1)(A)(ii), (b)(1)(B)(i)—because, according to the report of his initial arrest, he was "processed under Suspension Period Operations under the Securing the Border Proclamation." (DHS-70) When Mr. Malitskyi was finally asked whether he had a fear of returning to Ukraine on August 22, he did not indicate that he did have such a fear. (DHS-72) Six days later, a detention officer issued Mr. Malitskyi another expedited removal order. (DHS-66)

Mr. Malitskyi remains in immigration detention.

Argument

1. This Court should reject respondents' transparent effort to flout the requirements of 8 U.S.C. § 1231 as interpreted in *Zadvydas v. Davis*, and instead rule that the government has failed to carry its burden to rebut Mr. Malitskyi's showing that there is no significant likelihood of his removal to Ukraine in the reasonably foreseeable future.

For his first ground for relief, Mr. Malitskyi contends that his continued detention in immigration custody violates the Due Process Clause of the Fifth Amendment because he has been detained for more than six months and there is no likelihood that he will be removed to Ukraine in the reasonably foreseeable future. (Dkt. #1 at 10 ¶¶ 27–31) He asserted that he has an administratively final order of removal. (Dkt. #1 at 7 ¶ 24) His A-file confirms that the removal

order was issued on February 26, 2025 (DHS-60), the day he was arrested at the San Ysidro Port of Entry, under the authority of 8 U.S.C. § 1225(b)(1). As he explained in his petition, because he was ordered removed under § 1225(b)(1) based on a finding of inadmissibility, respondents' statutory authority to detain him now comes from 8 U.S.C. § 1231(a). (Dkt. #1 at 7–8 ¶ 24)

And to support his assertion that he cannot presently be removed to Ukraine on account of the war with Russia, he pointed specifically to (1) the similar finding of a judge in the Southern District of New York and (2) a directive from the FAA indicating that commercial air traffic over six major cities in Ukraine had been suspended on account of the war. (Dkt. #1 at 10 ¶¶ 29–31) And less than a week after Mr. Malitskyi filed this petition, the government told this Court in another case that it was impossible to remove *anyone* to Ukraine on account of the war. Mr. Malitskyi has thus "provide[d] good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001).

The government's only response to all of this is a feat of legerdemain. The government pretends that the six-month clock set forth in *Zadvydas* was reset on August 28, 2025, when respondents issued to Mr. Malitskyi a second expedited removal order. (Dkt. #10 at 7–9; Dkt. #16 at 7) But not even the government can turn back time. Contrary to the government's assertion that Mr. Malitskyi is "contesting" the "finality" of the February 26 expedited removal order "based on lacking a credible fear interview" (Dkt. #10 at 8), Mr. Malitskyi instead assumes that the February 26 order was valid on its face. Indeed, this Court has no jurisdiction to consider whether *either* expedited removal order is valid, because Mr. Malitskyi's petition does not invoke any of the grounds set forth in 8 U.S.C. § 1252(e)(2) and cannot bring before this Court any of the challenges described in 8 U.S.C. § 1252(e)(3). Moreover, respondents themselves treated the February 26 order as valid, because they tried to remove Mr. Malitskyi to Moldova in May of this year. Mr. Malitskyi certainly cannot ignore the fact that he has been in custody for over six months. The government should not be allowed to do that either.

Respondents' decision to issue a second removal order six months after the first order was issued is a transparent effort to flout the requirements of *Zadvydas*. The government agrees

that Mr. Malitskyi is being detained under the authority of 8 U.S.C. § 1231(a). (Dkt. #10 at 2; Dkt. #16 at 6) This statute "does not permit indefinite detention." *Zadvydas*, 533 U.S. at 689. Thus the statute also does not permit the government to do what it has done here—to reissue an expedited removal order after each six-month interval of detention and then argue that the detention is not unreasonably prolonged under *Zadvydas* because six months have not yet passed since the most recent removal order was issued. Respondents' actions, if repeated, would result in indefinite detention of the sort that the Court in *Zadvydas* ruled was unauthorized by statute and likely violated the Due Process Clause. This Court should reject the government's attempt to flout the requirements of § 1231 and the Constitution by manipulating the starting point for the *Zadvydas* clock.

Other than relying on this temporal sleight of hand, the government makes no argument either that (1) Mr. Malitskyi has not provided "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future," or (2) that it has any evidence in its possession to rebut such a showing. *Zadvydas*, 533 U.S. at 701. Indeed, the government told this Court in another habeas case involving a detained Ukrainian citizen with a final removal order that it *cannot* rebut such a showing. *See* Response to Petitioner's Motion for an Immediate Ruling on Preliminary Injunction at 3, *Serbenyuk v. Rivas*, No. 2:25-cv-2082-PHX-MTL (MTM) (D. Ariz. filed Aug. 20, 2025) (Dkt. #22). Yet in this case it says that the "status of whether [Mr. Malitskyi] can presently be returned to Ukraine based on the war with Russia is not an issue before this Court." (Dkt. #16 at 6–7) But that issue is the *very reason* why there is no significant likelihood of Mr. Malitskyi's removal in the reasonably foreseeable future. The war is still going on, and there is no end in sight. The government makes no effort to dispute that fact. Nor does it deny that it told this Court three weeks ago that it cannot remove *anyone* to Ukraine.

2. The government has likewise failed to show that this Court should not issue a preliminary injunction at least with respect to Mr. Malitskyi's *Zadvydas* claim.

The standard for granting a preliminary injunction are well known. "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his

favor, and that an injunction is in the public interest." *Planned Parenthood Great Northwest v. Labrador*, 122 F.4th 825, 843–44 (9th Cir. 2024) (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011)). All of the government's arguments against awarding Mr. Malitskyi preliminary relief rest on the same manipulation of the *Zadvydas* clock that it relied on to argue against granting him relief on the first ground in his petition. Mr. Malitskyi has already explained why the government's efforts to flout the requirements of *Zadvydas* should be condemned. The government thus is wrong that Mr. Malitskyi cannot show a likelihood of success on the merits of his claim. Far from it—he has shown that he is certain to prevail.

The rest of the government's arguments against granting preliminary relief fare no better. The government says that Mr. Malitskyi cannot show irreparable harm because "he is currently lawfully and mandatorily detained." (Dkt. #10 at 10) That is so only because the government is manipulating the *Zadvydas* clock. Mr. Malitskyi has already explained that illegal confinement is quintessentially irreparable harm, because "the deprivation of constitutional rights unquestionably constitutes irreparable injury." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). (Dkt. #3 at 2)

The government's assertion that the public interest and balance of the equities favor it, not Mr. Malitskyi, ignores *Zadvydas* in another way. The government agrees that these factors merge when a person applies for an injunction against the government. (Dkt. #10 at 10) And then it adds that the "public interest lies in the Executive's ability to enforce U.S. immigration laws and to keep convicted criminal aliens detained pending execution of their removal orders." (Dkt. #10 at 10) But Mr. Malitskyi has no criminal record in the United States. His A-file reveals that his only encounters with law enforcement have related to his participation in the Uniting for Ukraine program and to his effort to recover from getting lost while making an UberEats delivery. Furthermore, in *Zadvydas* the Court observed that the "plenary power" that Congress has "to create immigration law" "is subject to important constitutional limitations." 533 U.S. at 695 (citing *INS v. Chadha*, 462 U.S. 919, 942–43 (1983)). The statute that authorizes Mr. Malitskyi's detention here, 8 U.S.C. § 1231, contains "no clear indication of congressional intent

to grant the Attorney General the power to hold indefinitely in confinement an alien ordered removed." *Id.* at 697. The public has no interest in continuing to imprison a person like Mr. Malitskyi whom the government itself has acknowledged it cannot remove to his country of citizenship. The Supreme Court has already said that such imprisonment is unauthorized by statute. The public has no interest in seeing its government act unlawfully.

3. The government has failed to explain how it afforded Mr. Malitskyi any opportunity to request relief from removal to Moldova before it tried to remove him to that country.

In his second ground for relief, Mr. Malitskyi contends that his detention violates the Due Process Clause of the Fifth Amendment to the extent it is meant to facilitate removal to a country *other than Ukraine.* (Dkt. #1 at 11 (emphasis added). Mr. Malitskyi does not contend (as the government seems to think he does) that he was never given an opportunity to express fear of persecution or torture in Ukraine. Respondents have produced evidence that they tried to remove Mr. Malitskyi to Moldova. They have further admitted that they have no documentation of providing him notice and an opportunity to request relief from removal to that country.

So the government performs another feat of legerdemain. It points to two occasions on which, it says, respondents "interviewed [Mr. Malitskyi] to discuss whether he had a fear of persecution or torture in the event of his removal from the United States"—August 22 and August 24, 2025. (Dkt. #16 at 8) It points to the declaration of Fernando Valenzuela, an assistant field office director for the Calexico suboffice of the San Diego ICE field office.[2] Mr. Valenzuela also vaguely refers to interviews about a fear of persecution or torture "in the event of his removal from the United States." (Dkt. #16-1 at 5 ¶ 17) The documents that respondents provided in discovery are somewhat clearer—they document that Mr. Malitskyi "indicated no fear of return to country." (DHS-75) The most natural reading of this phrase is that he indicated no fear of persecution or torture in Ukraine, the country where he was born and the country to

[2] The government submitted this declaration along with its response to the motion for a preliminary injunction (Dkt. #10-1) and again along with its answer to the habeas petition (Dkt. #16-1). The two declarations appear to be identical.

which he had been ordered removed. Thus nothing in the government's answer to the petition, Mr. Valenzuela's declaration, or Mr. Malitskyi's A-file indicates that he was ever notified of an intent to remove him to Moldova or given an opportunity to express fear of persecution or torture in that country. The government should not be permitted to rely on vague assertions when Mr. Malitskyi specifically contends that he has not been given an opportunity to request relief from removal to any country other than Ukraine.

The government then suggests that because respondents gave Mr. Malitskyi an opportunity to express fear of persecution or torture in Ukraine, this ground for relief is moot. (Dkt. #16 at 8) This argument misses the mark, because this ground for relief is not moot simply because the government refuses to answer it on its own terms.

4. The government's arguments against granting Mr. Malitskyi a bond hearing before a neutral decisionmaker scarcely address his claim for relief.

In his third ground for relief, Mr. Malitskyi contends that his detention is illegal, in violation of the Due Process Clause of the Fifth Amendment, because respondents have not afforded him any periodic custody reviews or a bond hearing before a neutral decisionmaker, which he further contends is constitutionally required. (Dkt. #1 at 12–14 ¶¶ 35–38) The government's terse response to this claim relies on the same feat of legerdemain that it used to try and defeat Mr. Malitskyi's *Zadvydas* claim. Because, in the government's view, Mr. Malitskyi is "mandatorily detained under 8 U.S.C. § 1231 well-within the" 90-day removal period, it was not required to furnish the periodic custody reviews described in 8 C.F.R. §§ 241.4 or 241.13. (Dkt. #16 at 9) This view, as Mr. Malitskyi has previously explained, is a transparent effort to avoid the requirements of *Zadvydas*. And because the government agrees that "the[se] reviews are aimed at safeguarding against indefinite detention" (Dkt. #16 at 9 (cleaned up)), then this view means that respondents are disregarding their regulatory obligation to conduct these periodic reviews. In other words, the government has conceded that Mr. Malitskyi's due process rights are being violated.

The government also says that Mr. Malitskyi lacks standing to "challenge the constitutionality of 8 U.S.C. § 1231(a)(6)." (Dkt. #16 at 9) But even if that were the challenge

that Mr. Malitskyi has brought, the government is not actually making an argument based on lack of standing. It argues that Mr. Malitskyi "has failed established [*sic*] that he has been detained in violation of his due process rights, or that Respondents have violated 8 C.F.R. §§ 241.4 and 241.13" in support of its lack-of-standing theory. Those are arguments against the *merits* of his claims, not an argument that he lacks standing to bring his challenge. If what Mr. Malitskyi has alleged is true, then he is suffering a constitutional injury that can be redressed by an order from this Court directing respondents to either release him or furnish him a bond hearing before a neutral decisionmaker. And respondents have in fact denied him such a hearing. (DHS-76) The government's lack-of-standing arguments must be rejected.

Conclusion

This Court should grant Mr. Malitskyi's habeas petition and order him released from immigration detention immediately.

Respectfully submitted:

September 12, 2025.

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