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CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY ______ DEPUTY

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION**

Lenin A. Hernández Argujo
Petitioner,

v.

Diane Witte, Acting Field Office Director, El Paso Field Office, U.S. Immigration and Customs Enforcement; Kirstjen Nielsen, Secretary of the Department of Homeland Security; Ronald Vitiello, Acting Director, U.S. Immigration and Customs Enforcement; Jefferson Beauregard Sessions III, Attorney General of the United States; Joe Renteria, Officer in Charge, El Paso Service Processing Center,
Respondents.

CASE NO. EP 18 CV 0276

PETITION FOR WRIT OF HABEAS CORPUS

JUDGE KATHLEEN CARDONE

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INTRODUCTION

Petitioner Lenin Hernández Argujo, a twenty-two year old fleeing extortion and death threats by gang members in El Salvador, sought asylum at a port of entry in El Paso, Texas on or around May 27, 2016. He has been imprisoned by the immigration authorities ever since—for more than two years, or nearly one tenth of his life. Throughout this time, Mr. Hernández never has received the basic due process of a bond hearing before a neutral decisionmaker at which he could contest his imprisonment. Instead, the government has continued his detention based merely on "parole" reviews by Immigration and Customs Enforcement ("ICE")—the jailing authority. ICE has offered no reasons for Mr. Hernández's detention beyond the ticking of three check boxes on a form letter that assert, with no factual basis whatsoever, that he is a flight risk.

These parole reviews hardly justify Mr. Hernández's prolonged imprisonment. Mr. Hernández has followed all the rules, including every procedure for seeking asylum in this country, and has offered to cooperate in the prosecution of a fraudulent immigration attorney. He has established his identity, identified his U.S. citizen uncle as a sponsor with whom he could live, and submitted evidence that his uncle could support him. And the government concedes that Mr. Hernández poses no danger to the community. Yet the government has subjected

him to more than two years of imprisonment pending his immigration proceedings, with no end in sight.

Mr. Hernández's prolonged detention violates the Due Process Clause of the Fifth Amendment and the Immigration and Nationality Act ("INA"). Thus, at a minimum, this Court should order an immediate bond hearing, before this Court or before an immigration judge, where the government bears the burden of justifying by clear and convincing evidence that Mr. Hernández's detention is necessary to prevent his flight or protect public safety. But due process requires even more: this Court should order Mr. Hernández's immediate release because his detention bears no reasonable relation to any government purpose and because his parole reviews fail to provide any factual basis or facially legitimate and bona fide reason for his ongoing detention.

JURISDICTION AND VENUE

1. Petitioner is currently detained in the custody of Respondents at the El Paso Service Processing Center in El Paso, Texas.

2. Jurisdiction is proper under 28 U.S.C. §§ 1331, 2241, and the Suspension Clause, U.S. Const. art. I, § 2.

3. Venue is proper in the Western District of Texas. Mr. Hernández is detained under the authority of the ICE El Paso Field Office at the ICE El Paso Service Processing Center, and the El Paso Field Office Director, as well as the Deputy

Field Officer Director in charge of the El Paso Service Processing Center, are the appropriate respondents in a habeas petition challenging his detention. *Rumsfeld v. Padilla*, 542 U.S. 426, 435 (2004); 28 U.S.C. § 1391 (venue proper in any district in which a defendant resides).

PARTIES

4. Mr. Hernández is a citizen of El Salvador who fled his home country to seek asylum in the United States. He presented himself to immigration officers at a port of entry in the United States on or about May 27, 2016, and was detained by those officers. He has remained in immigration detention since that time.

5. Respondent Diane Witte is sued in her official capacity as Acting Field Office Director of the El Paso Field Office of ICE.

6. Respondent Kirstjen Nielsen is sued in her official capacity as the Secretary of the Department of Homeland Security. In this capacity, she directs DHS and ICE. As a result, Respondent Nielsen has responsibility for the administration of the immigration laws pursuant to 8 U.S.C. § 1103 and is a legal custodian of Petitioner.

7. Respondent Ronald D. Vitiello is sued in his official capacity as Acting Director of U.S. Immigration and Customs Enforcement ("ICE"), which is the sub-agency of the Department of Homeland Security ("DHS") that is responsible for

detaining noncitizens in removal proceedings and that oversees Mr. Hernández's detention at the El Paso Service Processing Center.

8. Respondent Jefferson Beauregard Sessions III is sued in his official capacity as the Attorney General of the United States. In this capacity, he has responsibility for the administration of the immigration laws pursuant to 8 U.S.C. § 1103, oversees the Executive Office of Immigration Review, and is a legal custodian of Petitioner.

9. Respondent Joe Renteria is sued in his official capacity as the Acting Deputy Field Office Director for the El Paso Field Office of ICE and Officer in Charge of the El Paso Service Processing Center.

FACTUAL BACKGROUND

10. Mr. Hernández is currently detained by U.S. Immigration and Customs Enforcement ("ICE") at the El Paso Service Processing Center in El Paso, Texas. He has been in immigration detention since May 27, 2016, or nearly 28 months.

11. Mr. Hernández was born in El Salvador in 1996. His uncle is a U.S. citizen, and his grandparents are lawful permanent residents. His uncle and grandparents live together in Santa Ana, California.

12. Mr. Hernández was forced to flee El Salvador in May, 2016, after he was beaten and threatened by members of MS-13, an armed gang that controls large swathes of territory in El Salvador.

13. Mr. Hernández was a student in El Salvador. On May 11, 2016, as he was walking to school, members of MS-13 approached him to demand that Mr. Hernández join the gang, sell drugs for them, and collect extortion money.

14. Mr. Hernández refused to be recruited because he opposed MS-13's illegal and brutal activities. The MS-13 gang members therefore demanded that he pay them $300 a month, threatening to kill him and his family if he did not comply.

15. When Mr. Hernández responded that he did not have the money, a gang member began to beat Mr. Hernández, striking him in the head and chest. The gang members warned Mr. Hernández that there would be trouble if he informed the police, as police officers worked for MS-13.

16. The gang members told Mr. Hernández that he had until the following day to decide what to do.

17. Fearing for his life, and unable to turn to the police for protection, Mr. Hernández fled El Salvador.

18. On or around May 27, 2016, Mr. Hernández presented himself to immigration authorities at the Paso Del Norte Port of Entry in El Paso, Texas and asked for asylum.

19. On June 30, 2016, an asylum officer determined that Mr. Hernández had a credible fear of persecution and referred him to immigration court to pursue his asylum claim.

Mr. Hernández's Removal Proceedings

20. Mr. Hernández had his first immigration court hearing on August 22, 2016. That hearing was a master calendar hearing, or group hearing. At that hearing, he did not have an attorney present, and the immigration judge granted him a continuance until September 15, 2016 to obtain counsel.

21. After that hearing, Mr. Hernández retained Annette Briones de Jesus to represent him in removal proceedings. Ms. Briones represented Mr. Hernández at his September 15, 2016 hearing and requested a continuance for preparation time.

22. Ms. Briones again appeared on Mr. Hernández's behalf on October 4, 2016, and again requested a continuance. The immigration court set the next hearing for November 17, 2016.

23. At that November 17, 2016 hearing, Ms. Briones filed an application for asylum on behalf of Mr. Hernández. An individual merits hearing on that application was scheduled for May 3, 2017.

24. Before that May 3, 2017 hearing could take place, however, Mr. Hernández discovered that Ms. Briones, who had held herself out as a licensed immigration attorney, was in fact a nonlawyer. ICE officials had allowed Ms. Briones to enter the El Paso Service Processing Center as an attorney and to fraudulently enter an appearance as counsel of record in Mr. Hernández's immigration proceedings.

25. During this period, Mr. Hernández was transferred from his detention center in El Paso, Texas, to a facility in Cibola County, New Mexico.

26. After discovering that Ms. Briones was not a lawyer, Mr. Hernández retained new counsel: Carlos Spector. Mr. Hernández had his first hearing as Mr. Spector's client before a new immigration judge in New Mexico on May 22, 2017.

27. At that May 22, 2017 hearing, the immigration judge, on her own motion, set a new master calendar hearing for Mr. Hernández. That hearing took place on June 13, 2017; at that hearing, Mr. Hernández's counsel sought and received a two-week continuance to prepare the case.

28. The next hearing took place on June 27, 2017, but Mr. Spector was unable to appear at the hearing because he had quadruple bypass surgery. As a result, the hearing was reset for July 17, 2017.

29. At the hearing on July 17, 2017, the immigration judge denied Mr. Hernández's motion for a change of venue to El Paso.

30. At that hearing, Mr. Spector explained that he was back to work (after his surgery), and that he would prepare an asylum application before the next master calendar hearing. The immigration judge scheduled that next hearing for August 14, 2017 and also scheduled an individual merits hearing for September 18, 2017.

31. The scheduled August 14, 2017 hearing never took place because ICE transferred Mr. Hernández back to El Paso, where his next hearing, once again

before a new immigration judge, took place on August 22, 2017. At that hearing, Mr. Hernández's counsel explained that the transfer had delayed the preparation of his asylum application.

32. As a result, Mr. Hernández's next hearing was scheduled for September 26, 2017.

33. On September 20, 2017, Mr. Spector received a rescheduling notice from the immigration court. That notice delayed the scheduled September 26, 2017 hearing until November 14, 2017.

34. On November 9, 2017, Mr. Spector received a rescheduling notice from the immigration court. That notice delayed the November 14, 2017 hearing until December 7, 2017 and assigned Mr. Hernández's case to yet another immigration judge.

35. At the December 7, 2017 hearing, Mr. Hernández filed a new asylum application, and the immigration judge scheduled his individual merits hearing for March 14, 2018.

36. On March 5, 2018, the immigration court postponed Mr. Hernández's individual hearing from March 14, 2018 to April 20, 2018.

37. On April 20, 2018, almost two years after he presented himself at the border, Mr. Hernández received his first hearing on the merits of his asylum claim. At that hearing, the immigration judge found that Mr. Hernández had testified credibly in

all respects, but nonetheless denied his asylum claim, holding that Mr. Hernández had not demonstrated a sufficient nexus between his fear of future persecution by MS-13 and a protected ground for asylum.

38. Mr. Hernández promptly appealed to the Board of Immigration Appeals ("BIA"). First, he argued that the immigration judge lacked jurisdiction over his case because the Notice to Appear was defective. Second, he argued that the immigration judge erroneously denied his asylum claim. Specifically, he noted that he had presented evidence that he was harmed on account of his political opinion (his opposition to MS-13's activities) and that he had presented evidence of past persecution (his testimony describing his beating at the hands of a member of MS-13). Mr. Hernández's appeal is still pending at the BIA.

39. Through his counsel, Mr. Hernández also referred Ms. Briones's fraud to local and federal law enforcement agencies for prosecution on federal perjury charges under 18 U.S.C. § 1621, arising from her unauthorized practice of law and materially false representations before federal and state agencies.

40. Mr. Hernández has volunteered to communicate and cooperate with law enforcement officials during any investigation into Ms. Briones's fraud.

41. On January 29, 2018, Mr. Hernández submitted a request to the Office of the Inspector General of the Department of Homeland Security to review and

investigate ICE misconduct in facilitating Ms. Briones's fraudulent access to Mr. Hernández and her unlawful appearance before an immigration judge.

Mr. Hernández's Prolonged Detention and Parole Denials

42. During Mr. Hernández's more than two years of detention, ICE has repeatedly denied him parole. ICE has never offered any factual basis for its denials.

43. Initially, Ms. Briones submitted parole requests on Mr. Hernández's behalf that ICE summarily denied.

44. On June 14, 2017, Mr. Spector filed a parole request for Mr. Hernández with several supporting documents, including proof that his uncle—then a lawful permanent resident and now a naturalized U.S. citizen—could provide a home and financial support for him while he is in immigration proceedings. That request was denied.

45. Mr. Hernández challenged those parole denials as a named plaintiff in a class action in the District of Columbia. In that case, he challenged ICE's failure to conduct individualized parole determinations. The court held that ICE's failure to do so violated its own parole directive, and issued a preliminary injunction requiring ICE to conduct new, individualized determinations. *See Damus v. Nielsen*, 313 F. Supp. 3d 317, 343 (D.D.C. 2018).

46. After that preliminary injunction, Mr. Hernández sought a new parole determination through Mr. Spector. That new parole request included documents showing that Mr. Hernández's uncle would be a reliable sponsor, including copies of identity documents, of pay stubs, and a 2017 tax return.

47. Mr. Hernández's new parole request also noted that Ms. Briones's fraudulent representation could make Mr. Hernández eligible for a U-visa, a form of immigration relief available to victims of crimes. The request noted that the delay by the ICE Office of the Inspector General in responding to Mr. Hernández's complaint has led to a corresponding delay in filing such an application, further prolonging Mr. Hernández's detention.

48. On July 24, 2018, Mr. Hernández received a form letter with boxes ticked next to the sentences: "You have not established to ICE's satisfaction that you are not a flight risk," "Imposition of a bond or other conditions of parole would not ensure, to ICE's satisfaction, your appearance at required immigration hearings pending the outcome of your case," and "ICE previously provided you with a written decision declining to grant parole, and you have failed to provide additional documentation or to demonstrate any significant changed circumstances which would alter ICE's previous determination."

49. The parole denial included no facts, nor did it address the facts that Mr. Hernández provided. For example, the denial did not address Mr. Hernández's

evidence that he would live with his recently naturalized U.S. citizen uncle, Juan Carlos Argujo Hernández. Nor did the denial address the fraudulent misrepresentation that delayed and prejudiced Mr. Hernández's immigration proceedings, nor his eligibility for a U-Visa as a victim of perjury, which would create an incentive for him to appear for subsequent hearings.

50. The denial, in stating that Mr. Hernández had not "provide[d] additional documentation or . . . demonstrate[d] any significant changed circumstances," did not acknowledge or address the extensive documentary evidence, in the form of pay stubs and a 2017 tax return, that Mr. Hernández's uncle has a steady income and could support him if released.

51. Mr. Hernández's prolonged detention has caused him psychological harm. A recent psychological evaluation found that Mr. Hernández is suffering from Major Depression and Posttraumatic Stress Disorder largely caused by "fear for his safety if deported to El Salvador and distress over the circumstances of prolonged and indefinite detention."

52. Mr. Hernández's transfer between detention centers made these symptoms worse still; he had an intense fear that he would be killed at the new detention center.

53. The psychological evaluation also found that "Mr. Hernández . . . suffers from persistent fears that he'll never see his family again, that he will die (possibly

soon) in detention, [and] that his mind is deteriorating." And detention has affected Mr. Hernández's self-perception. He reports that detention makes him "feel like a criminal, like I killed someone, but I didn't do anything."

54. Mr. Hernández misses his family and his freedom. He hopes to begin a new life in America. He does not understand why he has been jailed for over two years despite having been found to have a credible asylum claim and having offered to cooperate with authorities in an investigation of his nonlawyer.

55. In light of his asylum appeal and his potential eligibility for a U-visa as a result of his victimization by his nonlawyer, Mr. Hernández's removal case is not likely to be resolved for months or years, during which time he will be subject to detention absent intervention by this Court. Moreover, Mr. Hernández is ready to comply with all reasonable conditions of supervision upon his release, including electronic monitoring.

EXHAUSTION

56. There are no further administrative procedures that Petitioner is required to exhaust.

LEGAL BACKGROUND

57. 8 U.S.C. § 1225(b) provides procedures for the inspection of applicants for admission, including expedited removal of individuals who present at ports of entry and are deemed inadmissible on specified grounds.

58. Mr. Hernández is imprisoned pursuant to 8 U.S.C. § 1225(b)(1)(B)(ii). That provision applies to individuals who are otherwise subject to expedited removal but establish a "credible fear of persecution" during an interview with an asylum officer. Individuals who establish a credible fear of persecution have shown that there is a "significant possibility" that they are eligible for asylum in the United States. *Id.* § 1225(b)(1)(B)(v).

59. Section 1225(b)(1)(B)(ii) provides that these individuals "shall be detained for further consideration" of their application for asylum, which occurs at a removal hearing inside the United States. "The credible fear standard is designed to weed out non-meritorious cases so that only applicants with a likelihood of success will proceed to the regular asylum process. If the alien meets this threshold, the alien is permitted to remain in the U.S. to receive a full adjudication of the asylum claim—the same as any other alien in the U.S." H.R. Rep. No. 104-469, pt. 1, at 158 (1996).

60. Under the statute and regulations, arriving noncitizens are ineligible for bond hearings before an immigration judge even after they have passed their credible fear interviews. *See* 8 C.F.R. § 1003.19(h)(2)(i) ("[A]n immigration judge may not redetermine conditions of custody . . . [for] [a]rriving aliens in removal proceedings.").

61. The statute provides that individuals in Mr. Hernández's situation—those who presented themselves at ports of entry and were screened into this country after a favorable credible fear determination—can be considered for release only through the "parole" process. 8 U.S.C. § 1182(d)(5)(A); *see also Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018). ICE officers (i.e. the jailing authorities) informally conduct such reviews. Officers make parole decisions—that result in months or years of additional incarceration—by checking boxes on a form that contains no explanation of the factual basis for the decision.

62. The Due Process Clause forbids prolonged arbitrary imprisonment. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty" that the Due Process Clause protects. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Due process therefore requires "adequate procedural protections" to ensure that the government's asserted justification for physical confinement "outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Id.* at 690 (internal quotation marks omitted).

63. These basic due process protections apply to all noncitizens, including arriving asylum seekers like Mr. Hernández. *See Maldonado v. Macias*, 150 F. Supp. 3d 788, 800 (W.D. Tex. 2015) (holding that inadmissible noncitizens are entitled to due process protections); *see also Rosales-Garcia v. Holland*, 322 F.3d

386, 410 (6th Cir. 2003) (en banc) (concluding that "indefinite detention of excludable aliens raises the same constitutional concerns under those clauses as the indefinite detention of aliens who have entered the United States"); *see also Chi Thon Ngo v. I.N.S.*, 192 F.3d 390, 398 (3d Cir. 1999), *amended* (Dec. 30, 1999) (holding that due process requires that "excludable aliens" receive "an opportunity for an evaluation of the individual's current threat to the community and his risk of flight").

64. At a minimum, due process limits immigration detention without a hearing to "a reasonable time." *Maldonado*, 150 F. Supp. 3d at 808. An individualized hearing before a neutral decisionmaker to test the Government's justification for incarceration forms the bedrock procedural protection against prolonged arbitrary imprisonment, including in the immigration context. *See United States v. Salerno*, 481 U.S. 739, 750 (1987) (upholding civil pretrial detention of individuals charged with crimes only upon individualized findings of dangerousness or flight risk at custody hearings); *Foucha v. Louisiana*, 504 U.S. 71, 81-83 (1992) (requiring individualized finding of mental illness and dangerousness for civil commitment); *Kansas v. Hendricks*, 521 U.S. 346, 357 (1997) (upholding civil commitment of sex offenders after jury trial on lack of volitional control and dangerousness).

65. In *Jennings*, 138 S. Ct. at 842-47, the Supreme Court held that 8 U.S.C. § 1225(b) authorizes detention without a hearing until the conclusion of removal

proceedings. However, the Court did not address the constitutionality of prolonged detention without a bond hearing. *Id.* at 851 ("we do not reach [the constitutional] arguments").

66. Outside the national security context, the Supreme Court has never upheld the constitutionality of prolonged civil confinement without the bedrock protection of an individualized hearing as to the need for incarceration. *See Toyosaburo Korematsu v. United States*, 323 U.S. 214 (1944); *Ludecke v. Watkins*, 335 U.S. 160 (1948); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953).

67. Indeed, under due process principles, individuals must not only receive a hearing, but must be released when their detention is no longer reasonably related to a government purpose.

68. Due process and the parole statute also require that the government "articulate[] *some* individualized facially legitimate and bona fide reason for denying [a request for release on] parole, and *some* factual basis for that decision in each individual case" that is reasonably founded on the record evidence. *Marczak v. Greene*, 971 F.2d 510, 518 (10th Cir. 1992); *see also Sierra Immig. & Naturalization Serv.*, 258 F.3d 1213, 1219 (10th Cir. 2001); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1082-84 (9th Cir. 2006) (ordering the petitioner released where the government had based its parole denial on "facially implausible evidence" and where the petitioner's detention was unreasonably prolonged).

CLAIMS FOR RELIEF

Count One
(Due Process—Right to Bond Hearing)

69. All of the foregoing allegations are repeated and realleged as though fully set forth herein.

70. The Due Process Clause of the Fifth Amendment to the United States Constitution provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend V.

71. To justify Petitioner's ongoing prolonged detention, due process requires that the government establish, at an individualized hearing before a neutral decisionmaker, that Petitioner's detention is justified by clear and convincing evidence of flight risk or danger.

72. For these reasons, Petitioner's ongoing prolonged detention without a hearing violates due process, and the Court should order an immediate bond hearing where the government bears the burden of showing by clear and convincing evidence that his detention is necessary.

Count Two
(Due Process—Right to Release)

73. All of the foregoing allegations are repeated and realleged as though fully set forth herein.

74. Petitioner should be released because his prolonged detention is not reasonably related to any government purpose and violates the Due Process Clause.

Count Three
(Due Process and Immigration and Nationality Act—Invalid Parole Denial)

75. All of the foregoing allegations are repeated and realleged as though fully set forth herein.

76. Under the Due Process Clause and the parole statute, 8 U.S.C. § 1182(d)(5)(A), Petitioner should be released for the additional reason that ICE's denial of Petitioner's parole request without providing any factual basis and individualized, facially legitimate, and bona fide reason for the denial violates the Due Process Clause and the INA.

PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully prays the Court to:

a. Issue a Writ of Habeas Corpus; order an immediate bond hearing before this Court or the immigration court where the government bears the burden of showing that Petitioner's ongoing detention by clear and convincing evidence is justified based on a flight risk or dangerousness; or order Petitioner's release, with appropriate conditions of supervision if necessary, on the grounds that his detention is not reasonably related to

any government purpose, and that the government has failed even to provide any factual basis or facially legitimate and bona fide reason for his ongoing detention.

b. Issue a declaration that Petitioner's ongoing prolonged detention violates the Due Process Clause of the Fifth Amendment and the Immigration and Nationality Act;

c. Award Petitioner's costs and reasonable attorneys' fees in this action as provided for by the Equal Access to Justice Act, 28 U.S.C. § 2412; and

d. Grant such further relief as the Court deems just and proper.

Dated: September 20, 2018

Respectfully submitted,

By: /s/ Carlos Spector

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