IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Jose Noe Nuñez Martinez

Petitioner,

v.

Clair DOLL in his official capacity as Warden of York County Prison; Simona FLORES, in her official capacity as Field Office Director for United States Immigration and Customs Enforcement; Thomas D. HOMAN, in his official capacity as Acting Director of the United States Immigration and Customs Enforcement; Kirstjen M. NIELSEN, in her official capacity as Secretary of the United States Department of Homeland Security; and Jefferson Beauregard SESSIONS, III, in his official capacity as Attorney General of the United States;

Respondents.

Civil Action No.: _____

ELECTRONICALLY FILED

VERIFIED PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. SECTION 2241

Petitioner, Jose "Ivan" Noe Nuñez Martinez ("Mr. Nuñez Martinez"), through his attorneys, hereby petitions this Court to remedy his unlawful detention by either immediately ordering his release from detention or by ordering a bond hearing before a neutral arbiter, preferably this Court.

INTRODUCTION

1. Respondents have unlawfully detained Mr. Nuñez Martinez without a bond hearing since January 31, 2018. Unless this Court intervenes, he will languish in Respondents' custody for the duration of his immigration proceedings—which could take many months, or even years—without any opportunity for a neutral arbiter to determine the necessity of his detention.

2. Mr. Nuñez Martinez's detention is unnecessary because he poses no danger to the community and is not a flight risk. He is a gay man who is devoted to his U.S. citizen husband and has lived a productive life in the United States for nearly 17 years, working steadily and paying taxes. He has never been charged with or convicted of any crime.

3. In 2001, when he was approximately 21 years old, Mr. Nuñez Martinez entered the United States without inspection after fleeing his native Mexico, where he fears for his life. In 2010, his mother's health took a serious turn for the worse, which led him to travel briefly back to Mexico to see her, out of concern that her illness would prove fatal. When he attempted to re-enter the United States after that brief trip, agents from U.S. Customs and Border and Protection ("CBP") apprehended him and removed him pursuant to an expedited removal order. Because of his ongoing fear for his safety in Mexico, Mr. Nuñez Martinez re-entered the United States without inspection soon thereafter.

4. Respondents assert that their current custody of Mr. Nuñez Martinez is governed by the detention statute that applies to individuals with administratively final orders of removal, 8 U.S.C. § 1231. That assertion is wrong because Mr. Nuñez Martinez's 2010 removal order is not final. Rather, his credible and reasonable fear of removal to Mexico has triggered proceedings in which the Executive Office for Immigration Review ("EOIR") will adjudicate his claims for withholding of removal. Accordingly, Respondents' custody of Mr. Nuñez Martinez is "pending a decision on whether [he] is to be removed from the United States" and is governed by 8 U.S.C. § 1226(a), which entitles him to an individualized bond hearing before a neutral arbiter.

5. Even if § 1231 were to apply here, Mr. Nuñez Martinez's detention would be unlawful because § 1231 does not authorize ongoing confinement absent a finding of dangerousness or a finding that actual removal is reasonably foreseeable. Here, there is no evidence to support either finding. Consequently, this Court should order Mr. Nuñez Martinez's prompt release or order that he promptly receive an individualized bond hearing before a neutral arbiter, preferably this Court.

PARTIES

6. Petitioner, Mr. Nuñez Martinez, is a native and citizen of Mexico and is seeking withholding of removal under Section 241(b)(3) of the Immigration and Nationality Act ("INA") or under the Convention Against Torture ("CAT"), as codified at 8 C.F.R. § 1208.16(c). He is in Respondents' custody at the York County Prison in York, Pennsylvania.

7. Respondent Clair Doll is the Warden of York County Prison in York, Pennsylvania, and is Mr. Nuñez Martinez's immediate custodian. He is sued in his official capacity.

8. Respondent Simona Flores is the Field Office Director for Enforcement and Removal Operations ("ERO") in the Philadelphia Field Office of U.S. Immigration and Customs Enforcement ("ICE"). In this capacity, she has jurisdiction over the detention facility in which Mr. Nuñez Martinez is held, is authorized to release Mr. Nuñez Martinez, and is a legal custodian of Mr. Nuñez Martinez. She is sued in her official capacity.

9. Respondent Thomas D. Homan is the Acting Director of ICE. In this capacity he has responsibility for the enforcement of the immigration laws of the United States. Accordingly, he is the legal custodian of Mr. Nuñez Martinez. He is sued in is official capacity.

10. Respondent Kirstjen M. Nielsen is the Secretary of Homeland Security and head of the U.S. Department of Homeland Security, the arm of the

U.S. government responsible for enforcing the immigration laws. Ms. Nielsen is the ultimate legal custodian of Mr. Nuñez Martinez. She is sued in her official capacity.

11. Respondent Jefferson Beauregard Sessions, III is the Attorney General of the United States and heads the U.S. Department of Justice, which encompasses the Board of Immigration Appeals ("BIA") and immigration courts, known collectively as EOIR. Mr. Sessions shares responsibility for the implementation and enforcement of immigration laws with Respondent Nielsen. Mr. Sessions is a legal custodian of Mr. Nuñez Martinez and is sued in his official capacity.

JURISDICTION AND VENUE

12. This action arises under 28 U.S.C. § 2241, which provides that "[w]rits of habeas corpus may be granted by . . . the district courts." Accordingly, this Court has jurisdiction under 28 U.S.C. § 1331 because this is a "civil action arising under the . . . laws . . . of the United States."

13. Venue is proper in the Middle District of Pennsylvania because a substantial part of the events giving rise to these claims occurred in the Middle District, *see* 28 U.S.C. § 1391(b), and because Mr. Nuñez Martinez is imprisoned within the district, *see* 28 U.S.C. § 2241(d).

EXHAUSTION OF ADMINISTRATIVE REMEDIES

14. As a prudential matter, courts generally require a prisoner to exhaust administrative remedies before filing a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. *See Moscato v. Fed. Bureau of Prisons*, 98 F.3d 757, 760 (3d Cir. 1996). Exhaustion may be excused, however, if pursuing administrative relief would be futile. *See Schandelmeier v. Cunningham*, 819 F.2d 52, 53 (3d Cir. 1986). Here, Mr. Nuñez Martinez has exhausted all viable administrative remedies.

15. On February 22, 2018, Audrey L. Allen, immigration counsel for Mr. Nuñez Martinez ("Ms. Allen"), filed a letter-brief and accompanying evidence to Joshua Reid, Assistant Field Office Director for the Philadelphia Field Office of ICE – Enforcement and Removal Operations, requesting that ICE release Mr. Nuñez Martinez by paroling him, in its discretion. *See* Letter of Audrey Allen, dated February 22, 2018, attached hereto as Ex. A. ICE has not granted Ms. Allen's request and still confines Mr. Nuñez Martinez in its custody.

16. On March 14, 2018, Mr. Nuñez Martinez had a master calendar hearing before Immigration Judge John P. Ellington ("IJ Ellington") at the Immigration Court in York, Pennsylvania. At that hearing, IJ Ellington ruled that he lacked jurisdiction to review ICE's custody determination because Mr. Nuñez Martinez is in "withholding-only" proceedings—i.e., proceedings available to

someone with a prior removal order who now demonstrates a qualifying fear of removal to his country of origin or another putative receiving country.

17. Appealing IJ Ellington's ruling to the BIA would have been futile here because the BIA has already held that immigration judges lack authority to review ICE custody determinations for detainees like Mr. Nuñez Martinez. *See In re: Victor Alfonso Santos*, A 089-843-168 (B.I.A. Dec. 9, 2013), attached hereto as Ex. B ("Federal regulations do not confer jurisdiction upon Immigration Judges to consider a request for an individualized bond hearing filed by an [noncitizen], such as respondent, who is currently detained during the course of withholding only proceedings."). Because there are no remaining administrative remedies that could result in Mr. Nuñez Martinez's release from ICE custody pending his EOIR proceedings, this Court should adjudicate and grant his request for habeas corpus relief and either order his release or order that he receive a prompt bond hearing before a neutral arbiter, preferably this Court.

FACTS

18. Mr. Nuñez Martinez is a thirty-seven-year-old, gay man who was born and raised in Michoacán, Mexico.

19. During his formative years, Mr. Nuñez Martinez tried to hide his sexual orientation because he feared persecution because of it. He even went as far as dating women to try to mask his sexual orientation from others—a practice that pained him and ultimately proved untenable.

20. In or around the years 1999 or 2000, when Mr. Nuñez was about 19 or 20 years old, he attended a party outside of Michoacán and engaged in public displays of affection with another man. When Mr. Nuñez Martinez returned home, he learned that people in Michoacán were aware of his behavior at the party, and family members of the woman he had been dating made violent threats against him because of it.

21. In 2001, a closeted, gay friend of Mr. Nuñez Martinez was murdered after his behavior at a party sparked rumors about his sexual orientation.

22. Fearing violent reprisals against him because of his own sexual orientation, Mr. Nuñez Martinez fled Mexico and entered the United States without inspection in 2001. He lived in the United States continuously until briefly returning to Mexico in 2010 to visit his ailing mother, whose death he believed was imminent.

23. After that brief visit, Mr. Nuñez Martinez's ongoing fear for his safety in Mexico led him to try to re-enter the United States without inspection. CBP agents apprehended him at the border and removed him pursuant to an expedited removal order. Nevertheless, Mr. Nuñez Martinez's persistent fear for his life in Mexico led him soon thereafter to try again to re-enter the United States without inspection, which he did. He has lived continuously in the United States ever since.

24. For a total of nearly 17 years, Mr. Nuñez Martinez has lived a peaceful and productive life as a member of American society. Prior to his detention by Respondents, he was working full-time at an auto-body-repair shop, on average for 12 hours a day, 6 days a week. Before that he worked for approximately 13 years for a janitorial service company that primarily serviced locations damaged by disasters. Mr. Nuñez Martinez has steadily paid income taxes and has never been charged with or convicted of any crime. In all of his many years in the United States, he has cherished the relative safety with which he has been able to live his life as an openly gay man.

25. In August of 2014, Mr. Nuñez Martinez met Paul Frame, the love of his life and the man whom he would eventually marry. In a celebration including friends and loved ones, they married on April 9, 2016. *See* Marriage Certificate, attached hereto as Ex. C. They both consider their wedding day among the happiest of their lives. Photos of them, spanning their courtship, wedding, and life together as a married couple, are attached hereto as Ex. D.

26. In order to ensure a continued life together in the United States, Mr. Frame, a U.S. citizen, submitted a Form I-130, Petition for Alien Relative, to U.S. Citizenship and Immigration Services ("USCIS") for Mr. Nuñez Martinez. On January 31, 2018, they attended what they expected would be a routine marriage interview at a USCIS office. It was anything but: ICE agents stormed the interview and arrested Mr. Nuñez Martinez, shocking and horrifying both him and

his husband. Since then, ICE has detained him without bond at the York County Prison in York, Pennsylvania. USCIS has since determined that the marriage between Mr. Frame and Mr. Nuñez Martinez is bona fide and has approved the Form I-130. *See* Form I-130 Approval Notice with Receipt Number WAC-17-902-93959, attached hereto as Ex. E.

27. On January 31, 2018, ICE served Mr. Nuñez Martinez with notice of its intent to reinstate his prior removal order. *See* Form I-187, Notice of Intent/Decision to Reinstate Prior Order pursuant to 8 U.S.C. § 1231(a)(5), attached hereto as Ex. F. However, once Mr. Nuñez Martinez expressed fear for his life if removed to Mexico, ICE referred him to an asylum officer for a reasonable fear interview. *See* 8 C.F.R. §§ 208.31, 241.8, and 1208.31.

28. On February 13, 2018, an asylum officer interviewed Mr. Nuñez Martinez and determined on February 20, 2018, that he has a credible and reasonable fear of persecution in Mexico on account of his sexual orientation. *See* Record of Determination/Reasonable Fear Worksheet, attached hereto as Ex. G. On that basis the officer referred Mr. Nuñez Martinez's case to EOIR for withholding-only proceedings.

29. On April 30, 2018, Mr. Nuñez Martinez filed his application for withholding of removal before IJ Ellington. *See* Form I-589, Application for Asylum, Withholding of Removal, and Relief under the Convention Against Torture, attached hereto as Ex. H. IJ Ellington scheduled an evidentiary hearing on

the merits of that application to take place on August 15, 2018. Regardless of whether IJ Ellington eventually grants or denies the application after reviewing the evidence adduced at that hearing, the losing party will be able to take an appeal by right to the BIA. *See* 8 C.F.R. § 1003.1(b). Consequently, Respondents' confinement of Mr. Nuñez Martinez could last for many more months, or even years, pending the ultimate resolution of his EOIR proceedings.

30. As it is, Respondents' confinement of Mr. Nuñez Martinez has taken a heavy toll on him and his husband. The stress of ongoing detention has led Mr. Nuñez Martinez to lose weight and sleep poorly, and he fears that his confinement is exacerbating his diagnosed hypertension. At times, he has felt unsafe in Respondents' custody. Worst of all, he worries constantly about how his confinement is impacting his husband, whom he misses terribly.

31. Mr. Frame is suffering, too. He feels perplexed about why his husband is detained at all. He fears for his husband's physical safety, health, and mental wellbeing. He feels lonely without his husband: he misses his companionship and tenderness. Mr. Frame also has physical limitations that cause him to struggle with household responsibilities that his husband had customarily handled. Furthermore, the absence of income from his husband has made it harder to stay afloat financially.

32. The plight of Mr. Nuñez Martinez and his husband has captured the public imagination. The press has reported on their story, and over 1000 people

have signed a petition in support of Mr. Nuñez Martinez's swift release from ICE custody.[1]

33. Notwithstanding the strong public support for Mr. Nuñez Martinez, he still languishes in ICE custody. Unless this Court intervenes, Respondents' ongoing confinement of him will only further harm him and his husband, without advancing any legitimate purpose.

LEGAL FRAMEWORK

Detention under 8 U.S.C. §§ 1226 and 1231

34. The Immigration and Nationality Act ("INA") generally provides two sources of detention authority. The detention of individuals with pending immigration proceedings is governed by 8 U.S.C. § 1226, while 8 U.S.C. § 1231 governs the detention of individuals whose legal process has concluded in a final order of removal that merely awaits execution.

35. Section 1226 authorizes the detention of a noncitizen "pending a decision on whether [the noncitizen] is to be removed from the United States." Unless subject to mandatory detention provisions not at issue here, a noncitizen subject to § 1226 may be released on bond or non-monetary conditions and is entitled to a bond hearing before a neutral arbiter.

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[1] *See* Laura Benshoff, *Will Chesco Man's Arrest at Green Card Interview Scare Off Undocumented Immigrants Trying to Legalize Status?*, WHYY, Feb. 16, 2018, *available at* https://whyy.org/articles/ice-arrests-chesco-man-green-card-interview-will-scare-off-undocumented-immigrants-trying-get-legal/; *see also* Ex. A at 36 (copy of petition with over 1000 signatures, urging Mr. Nuñez Martinez's release).

36. By contrast, § 1231(a) governs the detention of noncitizens whose immigration proceedings have concluded. The statute establishes a 90-day period during which a noncitizen with a final order of removal "shall" be removed, and provides that the executive "shall" detain the noncitizen during that "removal period." 8 U.S.C. §§ 1231(a)(1) and (2). The "removal period" begins on the "date the order of removal becomes administratively final" (unless the noncitizen seeks judicial review or is confined by authorities other than immigration officials). 8 U.S.C. § 1231(a)(1)(B).

37. With certain exceptions, noncitizens "may" be detained beyond the removal period. 8 U.S.C. § 1231(a)(6). But the government interprets § 1231(a)(6) and applicable regulations to deny immigration judges jurisdiction to set bond or order release on non-monetary conditions. *See* 8 C.F.R. § 1236.1. Instead, the government maintains that its custody of individuals under § 1231(a)(6) is subject only to limited review by ICE itself.

38. The Supreme Court has interpreted §1231(a)(6) to authorize detention only when actual removal is "reasonably foreseeable." *Zadvydas v. Davis*, 533 U.S. 678, 689, 701 (2001). The Third Circuit has subsequently held that detention under § 1231 is intended "to secure [a noncitizen] pending that [noncitizen's] *certain* removal." *Leslie v. Att'y Gen. of the United States*, 678 F.3d 265, 270 (3d Cir. 2012) (emphasis added).

Reinstatement of Removal and Withholding-Only Proceedings

39. Title 8, Section 1231(a)(5) instructs the executive to "reinstate" the removal order of anyone who is found to have reentered the country illegally after being removed. Persons subject to reinstatement of removal generally cannot appear before an immigration judge and are instead subject to summary removal based upon their previous removal order, which is "reinstated from its original date." 8 U.S.C. § 1231 (a)(5); 8 C.F.R. § 241.8(a).

40. Nevertheless, if a noncitizen subject to reinstatement of removal expresses fear of being persecuted or tortured in his country of origin or another putative receiving country, an asylum officer must interview him to determine if he has a "reasonable fear" of persecution or torture in that country. 8 C.F.R. § 241.8(e). If the officer finds a reasonable fear, he must refer the noncitizen to an immigration judge for proceedings to determine whether he qualifies for withholding of removal—a form of protection from removal to a specific country in which the individual will suffer persecution or torture. *See* 8 U.S.C. § 1231(b)(3); 8 C.F.R. §§ 208.16, 208.31(e); *see also* 8 C.F.R. § 1208.2(c)(3)(i). Although the relief available in those proceedings is limited to withholding of removal, the proceedings themselves are still subject to the same procedures that apply in standard removal proceedings. 8 C.F.R. § 208.31(e).

The Finality of Removal Orders for People in Withholding-Only Proceedings and Its Bearing on Statutory Detention Authority

41. The crux of the legal issues presented by this Petition is whether the prior removal order of someone in withholding-only proceedings lacks the necessary finality to subject that person to detention under 8 U.S.C. § 1231 during the pendency of withholding-only proceedings.

42. In *Guerra v. Shanahan*, 831 F.3d 59, 62–63 (2d Cir. 2016), the Second Circuit Court of Appeals squarely addressed this issue and unequivocally held that § 1226, not § 1231, governs custody during withholding-only proceedings because there are clearly ongoing administrative proceedings that undermine the finality of the prior removal order otherwise needed to trigger § 1231. *Id*.

43. Prior to the Second Circuit's decision in *Guerra,* the Ninth Circuit had addressed when the removal order of a person in withholding-only proceedings is administratively final for purposes of seeking judicial review. The Court concluded that "the reinstated removal order does not become final until the reasonable fear of persecution and withholding of removal proceedings are complete." *Ortiz-Alfaro v. Holder*, 694 F.3d 955, 958 (9th Cir. 2012)[2]; *see also Luna-Garcia v. Holder*, 777 F.3d 1182 (10th Cir. 2015) (same).

44. In *Guerra* the government had tried to urge the Second Circuit to distinguish between the finality of a reinstated removal order for purposes of

[2] While the Petitioner recognizes that there is subsequent Ninth Circuit authority contrary to the Second Circuit's holding in *Guerra*, the Ninth Circuit explicitly embraced the misguided reliance on "tiers of finality" that the Second Circuit rightly rejected. *See Padilla-Ramirez v. Bible*, 88 F.3d 826, 836 (9th Cir. 2017).

seeking judicial review and the finality of a reinstated removal order for purposes of assessing the applicable statute governing custody pending withholding-only proceedings. The Second Circuit refused to draw such a distinction. "[W]e have never recognized such 'tiers' of finality. Moreover, the bifurcated definition of finality urged upon us runs counter to principles of administrative law which counsel that to be final, an agency action must 'mark the consummation of the agency's decisionmaking process.' *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016) (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997))."

45. Although some courts in this district have adopted the government's arguments in *Guerra*, they did so by embracing the "tiers of finality" that the *Guerra* court rightly rejected and by claiming that the judicial review available in withholding-only proceedings is not review of the underlying removal order but merely of whether a given country is an appropriate one for removal. *See Flores v. Doll*, 2017 WL 5496620 (M.D. Pa. Nov. 16, 2017), *Smith v. Sabol*, 2017 WL 4269410 (M.D. Pa. Sept. 9, 2017), *Bucio-Fernandez v. Sobol*, 2017 WL 2619138 (M.D. Pa. Jun. 16, 2017), *Dutton-Myrie v. Lowe*, 2014 WL 5474617 (M.D. Pa. Oct. 24, 2014). That reasoning is mistaken because it fails to take into account that removal orders are country-specific. That specificity is demonstrated by the regulation that provides for withholding-only proceedings for noncitizens who "express a fear of returning to the country designated in [the removal] order." 8 C.F.R. §241.8(e). Elsewhere the regulations elaborate that, during removal

proceedings, the IJ shall provide the noncitizen with an opportunity to designate a country, and "shall also identify for the record" any other countries to which he or she may be removed. 8 C.F.R. §1240.10(f); *cf. Tonfack v. Att'y Gen*., 580 Fed. Appx. 79, 81 (3d Cir. 2014) (concluding that the designation of a country or countries of removal is "encompassed in the removal order").

46. Indeed, many courts in this district have fully endorsed the Second Circuit's reasoning in *Guerra* and held that § 1226 governs the custody of noncitizens pending withholding-only proceedings and thereby affords them access to release on bond or other conditions and access to a bond hearing before a neutral arbiter. *See Ignacio v. Sabol*, 2016 WL 4988056, at *4 (M.D. Pa. Sept. 19 2016) (quoting *Guerra v. Shanahan*, 831 F.3d 59, 62-63 (2d Cir. 2016); *see also Sisiliano-Lopez v. Lowe*, 2017 WL 3602037 (M.D. Pa. Aug. 22, 2017), *Mendoza-Ordonez v. Lowe*, 273 F. Supp. 3d 528 (M.D. Pa. 2017), *Pierre v. Sabol*, 2012 WL 1658293 (M.D. Pa. May 11, 2012).

CLAIMS FOR RELIEF

FIRST CLAIM

Violation of the Immigration and Nationality Act, 8 U.S.C. § 1226(a)

47. Paragraphs 1 to 46 are incorporated here by reference as if set forth in full.

48. Although ICE notified Mr. Nuñez Martinez of its intent to reinstate his 2010 order of removal to Mexico, he is now in proceedings to determine whether he may in fact be removed under that order.

49. Consequently, Mr. Nuñez Martinez is detained "pending a decision on whether [he] is to be removed from the United States" under 8 U.S.C. § 1226(a), not pursuant to an "administratively final" order of removal under 8 U.S.C. § 1231(a). *See* 8 U.S.C. § 1101(a)(47)(B) (removal order is not final until both the immigration judge and BIA have completed their review). *See also Guerra*, 831 F.3d at 62–63; *Ignacio*, 2016 WL 4988056, at *4 (quoting *Guerra)*; *Sisiliano-Lopez*, 2017 WL 3602037; *Mendoza-Ordonez*, 273 F. Supp. 3d 528; *Pierre*, 2012 WL 1658293.

50. Noncitizens like Mr. Nuñez Martinez who are detained under 8 U.S.C. § 1226(a) are entitled to an individualized bond hearing to determine whether they pose a flight risk or danger warranting further detention.

51. Respondents' failure to afford Mr. Nuñez Martinez such a bond hearing violates 8 U.S.C. § 1226(a).

SECOND CLAIM

Violation of Due Process under the U.S. Constitution

52. Paragraphs 1 through 51 are incorporated by reference as if set forth in full.

53. Even if this Court determines that 8 U.S.C. § 1231 governs Respondents' custody of Mr. Nuñez Martinez, their detention of him pursuant to that authority is still unlawful under the Due Process Clause of the U.S. Constitution.

54. Due process permits the government to restrain an individual's liberty only where the government's justification for such restraint bears a "reasonable relation" to permissible purposes. *Jackson v. Indiana*, 405 U.S. 715, 738 (1972); *see also Foucha v. Louisiana*, 504 U.S. 71, 79 (1992); *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). In the immigration context, those purposes are "ensuring the appearance of [noncitizens] at future immigration proceedings and preventing danger to the community." *Zadvydas*, 533 U.S. at 690 (citations omitted). Where [a noncitizen] is detained pursuant to Section 1231, "the purpose of § 1231 detention is to secure [a noncitizen] pending [his] certain removal." *Leslie*, 678 F.3d at 270.

55. Those substantive limitations on detention are closely intertwined with procedural due process protections. *Foucha*, 504 U.S. 78-80. Noncitizens such as Mr. Nuñez Martinez have a right to adequate procedures to determine

whether their detention serves the purposes of protecting the community or ensuring their appearance. *Id.* at 49. "Our legal tradition rejects warehousing human beings while their legal rights are being determined, without an opportunity to persuade a judge that the norm of monitored freedom should be followed." *Hamama v. Adducci*, 285 F. Supp. 3d 997, 1003 (E.D. Mich. 2018).

56. Here, the government can demonstrate neither the necessity of Mr. Nuñez Martinez's detention nor its use of adequate procedures to arrive at the ongoing decision to confine him. Consequently, Mr. Nuñez Martinez's ongoing detention pursuant to 8 U.S.C. § 1231 violates both his substantive and procedural rights to Due Process.

57. If the Court does order a bond hearing to remedy either or both claims in this Petition, Mr. Nuñez Martinez respectfully requests that this Court conduct it to ensure that Mr. Nuñez Martinez's liberty interest is not left to the whim of a government agency that does not believe he is entitled to such a hearing at all. *See Leslie v. Holder*, 865 F. Supp. 2d 627 (M.D. Pa. 2012) (citations omitted) ("This District Court has in a number of instances conducted this bail review in immigration habeas matters.").

PRAYER FOR RELIEF

Mr. Nuñez Martinez respectfully requests that this Court conduct, or in the alternative, order, a constitutionally adequate hearing to be held within twenty-one

days, and grant such further relief, including an award of attorney's fees, as this Court deems just and proper.

Dated: May 22, 2018

By: */s/ Lauren M. Wilchek*

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**Petition pending for special admission to the bar of the Court*

†Petition pending for general admission to the bar of the Court

Habeas Counsel for Petitioner, Jose "Ivan" Noe Nuñez Martinez

VERIFICATION PURSUANT TO 28 U.S.C. SECTION 2242

I, Golnaz Fakhimi, hereby verify under penalty of perjury pursuant to 28 U.S.C. § 1746 that the factual allegations in the foregoing petition are true and correct, on information and belief (based on my review of the petition with Petitioner, Jose "Ivan" Noe Nuñez Martinez; his husband, Paul Frame; and Audrey L. Allan, Petitioner's immigration counsel).

Dated: May 22, 2018

/s/ Golnaz Fakhimi

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