

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

EDUARDO GUERRERO ORTIZ

Petitioner,

v.

WAYNE DAVIS, *in his official capacity as Sheriff of Henry County and Warden of Henry County Adult Detention Center*; RUSSELL HOTT, *in his official capacity as Field Office Director of the Immigration and Customs Enforcement, Enforcement and Removal Operations Washington Field Office*; ALEJANDRO MAYORKAS, *in his official capacity as Secretary of the Department of Homeland Security*; MERRICK GARLAND, *in his official capacity as Attorney General of the United States,*

Respondents.

**PETITION FOR A WRIT OF
HABEAS CORPUS**

Case No.

INTRODUCTION

1. The primary issue in this case is whether Immigration Customs Enforcement (“ICE”) can arrest and detain non-citizens without charge and without initiating removal proceedings against them. The answer is no. Yet, Petitioner Eduardo Guerrero Ortiz¹ (“Mr. Ortiz” or “Petitioner”) has been unlawfully detained by ICE for seven months at the Henry County Adult Detention Center (“Henry County ADC”) without being charged with any immigration violation or having removal proceedings initiated against him.

¹ Petitioner’s criminal proceedings contain the alias “Enrique Flores Santos.”

2. After Mr. Ortiz was released on bond pretrial by the Henry County Circuit Court, ICE arrested him only to bring him back to Henry County ADC a couple of days later on a writ of habeas ad prosequendum. A writ of habeas ad prosequendum is a court order requesting the appearance of a detained person in the custody of another jurisdiction. *See Stewart v. Bailey*, 7 F.3d 384, 389 (4th Cir. 1993) (citing *Thomas v. Whalen*, 962 F.2d 358, 361 n.3 (4th Cir.1992)). The purpose of the writ is to effectively “loan” the detained person to the summoning jurisdiction (here, Henry County) so they can immediately appear in court to achieve an “expeditious disposition” in ongoing proceedings. *Id.* (“[A]n accused is not even ‘in custody’ when he appears in another jurisdiction pursuant to that writ; he is merely ‘on loan’ to that jurisdiction’s authorities); *U. S. v. Mauro*, 436 U.S. 340, 360 (1978).

3. Given the writ’s purpose, Respondents’ conduct in this case constitutes nothing less than abuse. Even though ICE’s detention authority is premised on pursuing removal proceedings against people they detain, ICE has admitted that only “[u]pon return to ICE custody [will Mr. Ortiz] be processed,” and even then, it is only “likely that a charging document will be issued.” Ex. A, Tr. 34:1-5. Essentially, ICE has put the cart before the horse, leaving Mr. Ortiz to languish in legal limbo.

4. Mr. Ortiz has now been detained for *seven* months without being afforded the constitutionally mandated procedures under the immigration laws and governing regulations—with no end in sight. Mr. Ortiz’s detention violates the Immigration and Nationality Act and governing regulations and the Fourth and Fifth Amendments. Given these outrageous circumstances, he respectfully requests this Court grant his Petitioner for Writ of Habeas Corpus under 28 U.S.C. §2241.

JURISDICTION & VENUE

5. This Court has jurisdiction pursuant to 28 U.S.C. § 2241 (the general grant of habeas authority to the district court); Art. I § 9, cl. 2 of the U.S. Constitution (“Suspension Clause”); 28 U.S.C. § 1331 (federal question jurisdiction), and 28 U.S.C. § 2201, 2202 (Declaratory Judgment Act).

6. Federal district courts have jurisdiction to hear habeas claims by non-citizens challenging the lawfulness of their detention. See *Zadvydas v. Davis*, 533 U.S. 678, 687 (2001).

7. Administrative exhaustion is unnecessary as Mr. Ortiz has already exhausted any available remedies, and additional action would be futile. See *Aguilar v. Lewis*, 50 F. Supp. 2d 539, 542 (E.D. Va. 1999).

8. Venue is proper in this district and division pursuant to 28 U.S.C. § 2241(c)(3) and 28 U.S.C. § 1391(b)(2) and (e)(1) because a substantial part of the events or omissions giving rise to this action occurred and continue to occur at ICE’s Washington Field Office in Chantilly, Virginia within this district.

PARTIES

9. Petitioner Eduardo Guerrero Ortiz is a citizen of Mexico who is currently detained at the Henry County ADC in Henry County, Virginia, in the custody of ICE.

10. Wayne Davis (“Sheriff Davis”) is the Sheriff of Henry County and operates the Henry County ADC. Based on information and belief, Henry County ADC has no contract or agreement with ICE to detain non-citizens. Sheriff Davis is the immediate custodian of Petitioner. He is sued in his official capacity.

11. Russell Hott is the Field Office Director of the ICE Enforcement and Removal Operations (“ERO”) Washington Field Office. He is the federal agent overseeing the detention of

non-citizens in Virginia. Mr. Hott is a legal custodian of Petitioner. He is sued in his official capacity.

12. Alejandro Mayorkas is the Secretary of the U.S. Department of Homeland Security (“DHS”). DHS oversees ICE, which is responsible for administrating and enforcing immigration laws. Secretary Mayorkas is the ultimate legal custodian of Petitioner. He is sued in his official capacity.

13. Merrick Garland is the Attorney General of the United States. He oversees the immigration court system, housed within the Executive Office for Immigration Review (“EOIR”), and includes all IJs and the Board of Immigration Appeals (“BIA”). Additionally, immigration enforcement and detention are authorized to him under 8 U.S.C. §1226.

STATEMENT OF FACTS

I. MR. ORTIZ’S BACKGROUND

14. Eduardo “Eddie” Guerrero Ortiz was born in Tlalnepantla, Mexico, in 1994. Ex. B ¶ 1. He last entered the United States in 2014 on a B2 tourist visa. *Id.* ¶ 3.

15. A few years after coming to the United States, Mr. Ortiz met Lauren Hazelwood (“Ms. Hazelwood”), and the two married in 2019. *Id.* ¶ 4. The couple lives with Ms. Hazelwood’s mother in Walnut Cove, North Carolina. *Id.* ¶ 5.

16. Ms. Hazelwood suffers from debilitating medical issues exacerbated after contracting COVID in 2021. *Id.* ¶ 6. As a result, she cannot work full time and depends on Mr. Ortiz emotionally and as their family’s primary financial earner. *Id.* He works as a contractor in residential construction. *Id.* ¶ 5.

17. The couple has the support of their family, who live and work nearby in southern Virginia and northern North Carolina. *Id.* ¶ 7. Mr. Ortiz’s mother lives in Henry County, Virginia, and his sister is a police officer in Danville, Virginia. *Id.*

18. In October 2022, Ms. Hazelwood, a U.S. citizen, petitioned for Mr. Ortiz to become a lawful permanent resident based on their marriage. *Id.* ¶ 8; Ex. C1 at 1-2. Mr. Ortiz’s lawful permanent residency application is pending at U.S. Citizenship and Immigration Services (“USCIS”). As part of the application process, USCIS issued Mr. Ortiz an appointment to submit his biometrics on April 4, 2023, which he could not attend due to his current incarceration. C1 at 3.

II. CRIMINAL CHARGES

19. In September 2022, the Commonwealth of Virginia, in the Henry County Circuit Court, charged Enrique Flores Santos via direct indictment for two counts of distribution of methamphetamine under Va. Code Ann. §18.2-248. Ex. D1, Indictment. On November 30, 2022, the Henry County Sheriff’s Office arrested Mr. Ortiz, alleging that he and Enrique Flores Santos were the same person. *See* Ex. D2, Email from Commonwealth Attorney and Capias. He was detained pre-trial at the Henry County ADC. Ex. D3, Order for Continued Custody.

20. On December 20, 2022, the Henry County Circuit Court ordered Mr. Ortiz’s release on a \$75,000 bond with conditions that included pre-trial supervision, curfew, forfeiture of his passport, and residing with his mother in Martinsville, VA. Ex. D3 at 1.

21. On March 7, 2023, Mr. Ortiz paid his bond, and he was ordered released from the Henry County ADC on his pre-trial conditions. *Id.* at 2-4, Recognizance and Release Order. He was not released, however, until the next day. Ex. A, Tr. 12:14-13:20; Ex. B ¶ 12-13.

22. Based on information and belief, before Mr. Ortiz's release, ICE sent the Henry County Sheriff's Office an Immigration Detainer, Form I-287, and a Warrant for Arrest of [Non-Citizen], Form I-200. Ex. A, Tr. 10:4-11:19. Together, these forms request, but do not mandate, that the receiving jurisdiction "maintain custody of the [non-citizen] for a period **NOT TO EXCEED 48 HOURS** beyond the time when he/she would otherwise have been released..." (emphasis in the original). *See* Ex. C2 at 1-2. In Mr. Ortiz's case, the Henry County Sheriff elected to hold him until ICE officials came to Henry County ADC to pick him up. Ex. A, Tr. 13:5-20.

III. ICE ARRESTS AND DETAINS MR. ORTIZ

23. On March 8, 2023, ICE arrested Mr. Ortiz and transported him from Henry County ADC to the ICE processing center in Salem, Virginia. *Id.* Based on information and belief, while in ICE custody at the ICE processing center, Mr. Ortiz was issued two forms, both dated March 8, 2023: Form I-200, "Warrant for Arrest of [Non-Citizen]," and Form I-287, "Notice of Custody Determination." *Id.* at 15:14-16.

24. The Warrant for Arrest of [Non-Citizen] is a check-box form stating that an immigration officer has determined probable cause to believe the subject named on the form "is removable from the United States." Ex. C2 at 2.

25. The Notice of Custody Determination states that "[p]ursuant to the authority contained in section 236 of the Immigration and Nationality Act...I have determined that, pending a final administrative determination in your case, you will be: . . . Detained by the Department of Homeland Security." Ex. C2 at 3.

26. While at the ICE processing center in Salem, ICE did not provide Mr. Ortiz with a Form I-862, Notice to Appear, ("NTA") or any other documents charging him with any

immigration violations. Ex. A, Tr. 16:23-17:4. Instead, ICE transported Mr. Ortiz to the Western Virginia Regional Jail, which contracts with ICE to hold immigration detainees on a short-term basis. *Id.* at 31:10-13.

27. That same day, on March 8, 2023, the Henry County Circuit Court issued a Writ of Habeas Corpus Ad Prosequendum requesting ICE surrender Petitioner to the Sheriff of Henry County² and stating in relevant part:

“[T]o the end that he will be held for a hearing before the Circuit Court, Henry County Courthouse...on or about March 27, 2023, at 9:00 AM, and detained during the proceedings in the Henry County Adult Detention Center, Martinsville, Virginia. The defendant is to thereafter remain in the custody and care of the Henry County Sheriff’s Office until the conclusion of the case. Upon completion of this case, or upon demand of the United States Department of Homeland Security, the aforesaid Sheriff L.A. Perry shall return and transport promptly such prisoner to your custody...”³

Ex. D4, Writ of Habeas Corpus Ad Prosequendum.

28. The next day, pursuant to the writ, ICE authorized the Henry County Sheriff’s Office to pick up Mr. Ortiz at Western Virginia Regional Jail and transport him back to Henry County ADC, where he remains. Ex. A, Tr. 21:22-22:10.

29. On March 17, 2023, Petitioner, through his defense counsel, filed a Petition for Writ of Mandamus in his criminal proceedings in the Henry County Circuit Court. Ex. D5. The Petition argued that the writ of habeas corpus ad prosequendum did not transfer Petitioner’s legal

² Sheriff Perry retired in March 2023. Based on information and belief, Sheriff Davis is presently the Sheriff of Henry County.

³ Despite Mr. Ortiz’s physical custody at Henry County ADC, ICE’s custody and control over him remained unchanged when ICE returned him to Henry County pursuant to the writ of habeas corpus ad prosequendum. Henry County is “considered simply to be borrowing [him].” *Jiron-Garcia v. Cmmw.*, 633 S.E.2d 744, 749 (Va. App. 2006) (citing *Ruggiano v. Reish*, 307 F. 3d 121, 125 n. 1 (3d Cir. 2022) (“the sending sovereign’s custody and control over the incarcerated accused is never interrupted.”)).

custody to Henry County nor permit the Henry County Sheriff to detain him further. *Id.* at 2 ¶ 5 (“Mr. Ortiz—having posted bond—must now be released, for while the writ directs ICE to loan Mr. Ortiz back to the Henry County Sheriff, it does not legally transfer his custody to be held without bail.”).

30. On April 24, 2024, the Circuit Court of Henry County denied Mr. Ortiz’s Petition for a Writ of Mandamus, finding that “Mr. Ortiz remains in the custody of ICE as a federal detainee being held at Henry County Adult Detention Center.” Ex. D6. On June 14, 2023, Petitioner motioned the Henry County Circuit Court to reconsider the denial of Petitioner’s Writ of Mandamus. Ex. D7. This time, Mr. Ortiz presented evidence that ICE had “relinquished custody [of Mr. Ortiz] altogether” and, therefore, “Mr. Ortiz is only being held under the authority of the Sheriff’s Department.” *Id.* at 2 ¶ 11.

31. On July 11, 2023, the Henry County Circuit Court held a hearing on Petitioner’s motion to reconsider. Ex. A at 1. In the hearing, a Supervisory Deportation Officer from ICE ERO Craig D. Fileccia (“Officer Fileccia”), and Sheriff Davis testified. *Id.* at 2. Officer Fileccia testified that he did not charge Mr. Ortiz with any immigration offenses or issue him an NTA. He also testified that Mr. Ortiz did not have a pending immigration case. *Id.* at 27:4-17. When asked why ICE issued a second immigration detainer on April 20, 2023, he stated, “It is ICE’s local policy that when we release somebody on a writ, we also send an immigration detainer...It is a backstop in case of erroneous release.” *Id.* at 35:5-13.

32. Sheriff Davis testified that he would not release Mr. Ortiz based on the writ, ICE detainer, and warrant of arrest issued by ICE. *Id.* at 53:14-20.

33. Ultimately, the Circuit Court of Henry County denied Petitioner’s motion to reconsider, explaining, “[t]here is no reason for Henry County to release [Mr. Ortiz] because under the writ [ICE][has] authority to hold him until the state proceedings are concluded. And until that happens, he will stay here, unless he gets a bond from the federal system.” The Court found that because Mr. Ortiz is merely on loan from ICE, and thus still in ICE’s legal custody, “Henry County has no authority to release him.” *Id.* at 74:8-15.

34. Mr. Ortiz has never received an NTA or any other documents from ICE or any other federal agency detailing immigration violations or charges against him. He has also not received any information confirming that he is subject to removal proceedings. Based on information and belief, removal proceedings have not been initiated against him.⁴

LEGAL BACKGROUND AND ARGUMENT

I. THE IMMIGRATION AND NATIONALITY ACT ONLY AUTHORIZES DETENTION PENDING REMOVAL

35. ICE has failed to follow the constitutionally mandated statutes and regulations governing immigration enforcement. The Immigration and Nationality Act only authorizes the arrest and detention of non-citizens “pending a decision on whether the [non-citizen] is to be removed from the United States.” 8 U.S.C. §1226(a). Under the governing regulations, the NTA, which lists, among other pertinent information, the immigration charges and authority for immigration enforcement action, must be issued to the non-citizen upon or before the execution of the warrant authorizing a non-citizen’s arrest under the statute. 8 C.F.R. §236.1(b) (“At the time

⁴ Once removal proceedings have been initiated with the immigration court, e.g., after ICE files an NTA, the case status page on the Executive Office of Immigration Review’s (“EOIR”) website would contain information related to a pending case. The EOIR website contains no record of Mr. Ortiz’s case. *See* Ex. C3.

of issuance of the notice to appear, or at any time thereafter and up to the time removal proceedings are completed, the respondent may be arrested and taken into custody under the authority of Form I-200, Warrant of Arrest.”); 8 U.S.C. §1229(a); 8 C.F. R. §1239.1.⁵ After ICE serves the non-citizen with the NTA, it must be filed with the immigration court to start removal proceedings against that noncitizen. *See* 8 C.F.R. §§1003.13, 1003.14.

36. Consistent with the statutory and regulatory scheme, long-standing ICE policy requires that non-citizens be provided NTAs “as soon as possible after being taken into custody, but no longer than forty-eight (48) hours in the absence of exceptional circumstances.” Ex. E, ICE Transportation, Detention and Processing Policy.

37. No provision of the INA or its governing regulations authorizes the detention of a non-citizen like Mr. Ortiz without charge.⁶ In fact, ICE’s detention authority is premised on immigration officers following the statutory and regulatory arrest requirements. When ICE fails to follow the INA and its governing regulations, they deprive the non-citizen of those statutorily and constitutionally required procedures that inform a non-citizen of the charges against them, the basis for their arrest and detention, and an opportunity to defend against their removal and detention.

38. In Mr. Ortiz’s case, by failing to comply with these requirements, ICE has also violated another section of the INA, which provides a statutory right of non-citizens to defend

⁵ When ICE arrests a non-citizen without a warrant under 8 U.S.C. §1357(a), the governing regulations require that a determination be made within 48 hours of arrest whether to issue a NTA *and* keep the non-citizen detained. 8 CFR § 287.3(d). In “an emergency or other extraordinary circumstance,” the regulations permit ICE to exceed the 48-hour time limitation and make its charging and custody determination “within an additional reasonable period of time.” 8 CFR §287.3(a)-(b).

⁶ Even in terrorism cases, Congress has required the government to charge people held under the color of the Patriot Act’s immigration provision within seven days and mandated release where no charges are brought within that time. 8 U.S.C. § 1226a(a)(5).

against removal proceedings and petition the government for any benefits they may be entitled to. 8 U.S.C. §1229a(b)(4).

II. DUE PROCESS REQUIRES A REASONABLE FIT BETWEEN DETENTION AND THE GOVERNMENT'S PURPOSE AND ADEQUATE PROCEDURAL PROTECTIONS

39. The Due Process Clause guarantees that all persons physically within the United States must “be free from detention that is arbitrary or capricious.” *Zadvydas*, 533 U.S. at 721 (Kennedy, J., dissenting); *see also Mathews v. Diaz*, 426 U.S. 67, 77, 87 (1976) (confirming that those “whose presence in this country is unlawful, involuntary, or transitory” have due process rights); *Lozano-Castaneda v. Garcia*, 238 F. Supp. 2d 853, 861 (W.D. Tex. 2002) (“This Court agrees that the fundamental right to be free from bodily restraint is not reserved exclusively for citizens; rather, ‘all persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth] amendments.’”) (quoting *Wong Wing v. United States*, 163 U.S. 228, 238 (1896)).

40. “Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty” protected by the Due Process Clause. *Zadvydas*, 533 U.S. at 690. While the Courts have “recognized detention during deportation proceedings as constitutionally valid,” *Demore v. Kim*, 538 U.S. 510, 532 (2003), that detention is only authorized “in certain narrow nonpunitive circumstances where a special justification, such as harm-threatening mental illness, outweighs the individual’s constitutionally protected interest.” *Zadvydas*, 533 U.S. at 690. (internal quotations and citations omitted). Further, where the government fails to pursue removal proceedings, continued immigration detention loses any connection to its sole legitimate purpose— determining whether the government has a legal basis for deportation. *Demore*, 538 U.S. at 532-33 (Kennedy, J., concurring). Such unreasonable delay

renders further detention excessive, rather than reasonable, in relation to its purpose. *Portillo v. Hott*, 322 F. Supp. 3d 698, 707 (E.D. Va. 2018) (outlining five factors for determining when prolonged detention becomes unreasonable, including “dilatatory factors employed in bad faith” and “procedural or substantive legal errors that significantly extend the duration of detention”); *see also Ly v. Hansen*, 351 F.3d 263, 272 (6th Cir. 2003) (explaining that a noncitizen’s efforts to seek relief “do[] not authorize the [then-]INS to drag its heels indefinitely” and holding that “[t]he entire process . . . is subject to the constitutional requirement of reasonability”); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1080 (9th Cir. 2006) (holding that “plainly unreasonable” continued detention was unauthorized).

41. As the government itself stated in Supreme Court litigation, unreasonable delay “in pursuing and completing” removal proceedings “may indicate that continued detention is actually for an impermissible collateral purpose (or no purpose at all).” Brief of Petitioners at 48, *Jennings v. Rodriguez*, No. 15-1204 (Aug. 26, 2016) (internal quotation marks omitted).

42. For nearly seven months, ICE has taken no steps to determine whether Mr. Ortiz is entitled to remain in the United States. ICE has not issued Mr. Ortiz an NTA, permitted Mr. Ortiz to obtain review of his custody by an Immigration Judge, or taken any other steps to permit the adjudication of his claimed right to remain in the country.

43. Prejudice should be presumed here because ICE has failed to follow its own constitutionally mandated policy. *See U.S. v. Morgan*, 193 F.3d 252, 267 (4th Cir. 1999) (“Where compliance with the regulation is mandated by the Constitution, prejudice may be presumed.”) (quoting *Matter of Garcia-Flores*, 17 I. & N. Dec. 325, 329 (BIA 1980); *Sanchez v. Sessions*, 904 F.3d 643, 652 (9th Cir. 2018).

44. Even without presuming, however, this Court can and should find that Mr. Ortiz’s prolonged detention has prejudiced not only his liberty interests, but he has also effectively been foreclosed from seeking immigration relief to which he may be entitled. Mr. Ortiz is married to a U.S. citizen and has a pending application for legal permanent residency with the U.S. Citizenship and Immigration Service (“USCIS”). Since being detained by ICE, he has missed his requisite USCIS appointments to advance his application for legal permanent residency. *See* Ex. C3. Had ICE followed its normal, required procedures, Mr. Ortiz would have had the opportunity to present his permanent residency application before an Immigration Judge in a timely manner. Because Mr. Ortiz has been unlawfully detained without being placed in removal proceedings, he has no ability to access the immigration courts to defend against his removal from the United States.

45. From the start, Mr. Ortiz’s detention has violated the Due Process Clause, and his release is warranted.

III. FOURTH AMENDMENT PROTECTS NON-CITIZENS FROM UNREASONABLE SEIZURES

46. Being held in jail, “regardless of its label”—whether it is “termed ‘arrest[.]’ or ‘investigatory detention[.]’”—is a seizure that triggers the Fourth Amendment’s full protections. *Dunaway v. New York*, 442 U.S. 200, 215-16 (1979) (internal quotation marks and citations omitted); *see also Brown v. Illinois*, 422 U.S. 590, 605 (1975).

47. It is well settled that civil immigration seizures, like criminal seizures, must comply with the Fourth Amendment. *See Arizona v. United States*, 132 S. Ct. 2492, 2509 (2012) (noting that “[d]etaining individuals solely to verify their immigration status would raise constitutional concerns,” and citing Fourth Amendment cases); *see also Cotzojay v. Holder*, 725 F.3d 172, 181 (2d Cir. 2013) (“[I]t is uncontroversial that the Fourth Amendment applies to [non-citizens] and citizens alike.”); *Oliva-Ramos v. Att’y Gen. of U.S.*, 694 F.3d 259, 284-85 (3d Cir. 2012)

(reaffirming that civil immigration enforcement actions must be “consistent with the limitations imposed by the Fourth Amendment”); *Melendres v. Arpaio*, 695 F.3d 990, 1000-01 (9th Cir. 2012) (applying Fourth Amendment to immigration arrests); *Au Yi Lau v. INS*, 445 F.2d 217, 222 (D.C. Cir. 1971) (“We agree with the Government that the [INA’s] arrest provision must be read in light of constitutional standards,” such that arrests must be supported by “probable cause”). As the Supreme Court has explained, “[t]he Fourth Amendment applies to all seizures of the person.” *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 881-82 (1975).

48. To comply with the Fourth Amendment, immigration seizures must be supported by probable cause and, at some point, that probable cause “determination must be made by a judicial officer” who can make a neutral and detached assessment. *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975). This judicial determination must occur “either before” the seizure in the form of a judicially issued warrant, or “promptly after” the seizure in the form of a probable cause hearing. *Id.* The Supreme Court has held that, absent extraordinary circumstances, this determination must be made within 48 hours of the arrest. *County of Riverside v. McLaughlin*, 500 U.S. 44, 58-59 (1991).

49. Mr. Ortiz’s detention is clearly a seizure for which the Fourth Amendment protection applies. To comply with the Fourth Amendment, ICE was required to afford him the basic procedures and protections outlined in immigration law and its governing regulations. *See Sanchez v. Sessions*, 904 F.3d 643, 652 (9th Cir. 2018) (holding that regulations regarding immigration detention and the Fourth Amendment standards they reflect are “not mere best-practices suggestions for immigration officers.”). Under the INA and governing regulations, ICE was required to issue Mr. Ortiz an NTA and initiate removal proceedings immediately upon his seizure, and by failing to do so, they violated his Fourth Amendment rights. *See* 8 U.S.C. §1226(a);

8 C.F.R. §236.1(b); *see also, Morgan*, 193 F.3d at 267 (“Where compliance with the regulation is mandated by the Constitution, prejudice may be presumed.”) (quoting *Matter of Garcia-Flores*, 17 I. & N. Dec. 325, 329 (BIA 1980)).

CLAIMS FOR RELIEF

COUNT I

VIOLATION OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. §1226

50. Petitioner incorporates the allegations of the proceeding paragraphs as if fully set forth herein.

51. 8 U.S.C. §1226 only authorizes detention of non-citizens “pending a decision on whether the [non-citizen] is to be removed from the United States.” 8 U.S.C. §1226(a).

52. In the nearly seven months Petitioner has been in detention, ICE has taken no steps to determine whether he is to be removed from the United States. Therefore, no decision is pending regarding his removability, and his detention is not authorized by 8 U.S.C. §1226(a).

53. 8 U.S.C. §1226(c)(1) only authorizes the detention of non-citizens charged as deportable or inadmissible for the reasons outlined in subsections (A)-(D). ICE has no authority to detain a non-citizen not charged as inadmissible or deportable under the Immigration and Nationality Act.

54. Because Petitioner has not been charged as inadmissible or deportable under 8 U.S.C. §1226(c)(1)(A)-(D), his initial and continued detention violates 8 U.S.C. §1226(c)(1).

55. Petitioner’s detention violates 8 U.S.C. §1226(a), (c)(1), and he must be immediately released.

COUNT II

VIOLATION OF 5 U.S.C. §§706(2)(A)-(D) (ULTRA VIRES)

56. Petitioner incorporates the allegations of the proceeding paragraphs as if fully set forth herein.

57. ICE has violated 8 U.S.C. §1226, governing regulations, and its own policy by arresting and detaining Mr. Ortiz for nearly seven months without charging or providing him with notice of the charges against him. His detention is not authorized under 8 U.S.C. §1226(a) because he is not “pending a decision on whether [he] is to be removed from the United States,” nor has he been charged as inadmissible or deportable under 8 U.S.C. §1226(c)(a)-(d).

58. ICE exceeded its statutory authority, causing Petitioner harm by taking away, limiting, and otherwise impacting his liberty without lawful authority in violation of the APA.

COUNT III

FOURTH AMENDMENT VIOLATION

59. Petitioner incorporates the allegations of the proceeding paragraphs as if fully set forth herein.

60. The Fourth Amendment requires that all arrests be approved by a neutral judicial official, either before the arrest (in the form of a warrant) or promptly afterward (in the form of a prompt judicial probable cause determination). *See Gerstein*, 420 U.S. at 125. Absent an emergency or other extraordinary circumstance, a detention of more than 48 hours prior to a judicial probable cause determination violates the Fourth Amendment as a matter of law. *See County of Riverside*, 500 U.S. at 57.

61. When ICE issued a Petitioner a detainer and a warrant for his arrest, they were required to initiate removal proceedings and provide him with notice of the charges against him in a prompt manner, but they failed to do so. As such, his seizure did and continues to violate the Fourth Amendment. ICE has unreasonably taken away, limited, and otherwise impacted Petitioner's liberty in violation of the Fourth Amendment.

**COUNT IV
VIOLATION OF FIFTH AMENDMENT DUE PROCESS**

62. Petitioner incorporates the allegations of the proceeding paragraphs as if fully set forth herein.

63. Given the shocking length of time Mr. Ortiz has been in detention without having removal proceedings initiated against him, his continued detention bears no reasonable relation to ICE's only permissible purpose – determining whether the government has a legal basis for deportation.

64. His continued and prolonged detention has unreasonably taken away, limited, or otherwise impacted his liberty in violation of the Fifth Amendment.

**COUNT V
VIOLATION OF FIFTH AMENDMENT PROCEDURAL DUE PROCESS**

65. Petitioner incorporates the allegations of the proceeding paragraphs as if fully set forth herein.

66. Noncitizens have the same liberty interest as citizens in freedom from physical confinement. Detention “for any purpose constitutes a significant deprivation of liberty.” *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (quoting *Jones v. United States*, 463 U.S. 354, 361 (1983)). And noncitizens enjoy no less protection than other persons against wrongful detention. They may

not be seized or imprisoned for crimes without the same procedural safeguards owed to citizens. *Wong Wing*, 163 U.S. at 238; *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973).

67. Here, ICE has failed to provide even the most basic procedural protections afforded under the INA and governing regulations. They failed to notify him of the charges against him and denied him access to the immigration court by failing to initiate removal proceedings against him. For nearly seven months, he has been cut off from any available avenue to seek a review of ICE's custody over him. During the seven months of detention, Petitioner has been afforded no procedure that conforms with Due Process.

68. For these reasons, Petitioner's detention has unreasonably taken away, limited, or otherwise impacted his liberty in violation of the Fifth Amendment.

PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully requests the Court to

1. Assume jurisdiction over this matter;
2. Issue a writ of habeas corpus and order Respondents to show cause, within three days of filing this petition, why the relief Petitioner seeks should not be granted and set a hearing on this matter within five days of Respondents' return on the order to show cause, pursuant to 28 U.S.C. §2243;
3. Declare that Petitioner's continued detention violates the Immigration and Nationality Act, 8 U.S.C. §1226.
4. Order Petitioner's immediate release;
5. Grant any other relief this Court deems just and proper.

Dated: October 6, 2023

Respectfully submitted,

/s/ _____

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Pending Pro Hac Vice Admission

**VERIFICATION BY SOMEONE ACTING ON PETITIONER'S BEHALF PURSUANT
TO 28 U.S.C. § 2242**

I am submitting this verification on behalf of the Petitioner because I am the attorney for Petitioner. I have discussed with the Petitioner the events described in this Petition. Based on those discussions, I hereby verify that the statements made in the attached Petition for Writ of Habeas Corpus are true and correct to the best of my knowledge.

Dated: October 6, 2023

Respectfully submitted,

/s/
Sophia Gregg
Pro Bono Counsel for Petitioner

CERTIFICATE OF SERVICE

I, the undersigned counsel, hereby certify that on this date, I filed this Petition for Writ of Habeas Corpus and all attachments using the CM/ECF system. My co-counsel will furthermore mail a copy by USPS Certified Priority Mail with Return Receipts to each of the following individuals:

Wayne Davis, Sheriff
3250 Kings Mountain Road
Martinsville, VA 24112

Russell Hott, Field Office Director
U.S. Immigration and Customs Enforcement, Washington Field Office
c/o DHS Office of the General Counsel
2707 Martin Luther King Jr. Ave, SE
Washington, DC 20528-0485

Alejandro Mayorkas, Secretary
U.S. Department of Homeland Security
c/o DHS Office of the General Counsel
2707 Martin Luther King Jr. Ave, SE
Washington, DC 20528-0485

Merrick Garland, Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Jessica D. Aber, U.S. Attorney
c/o Civil Process Clerk
Eastern District of Virginia, Alexandria Division
2100 Jamieson Avenue
Alexandria, VA 22314

Dated: October 6, 2023

Respectfully submitted,

/s/
Sophia Gregg
Pro Bono Counsel for Petitioner