UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Arturo MARTINEZ BAÑOS, Edwin FLORES TEJADA, and German VENTURA HERNANDEZ, on behalf of themselves as individuals and on behalf of others similarly situated, Plaintiffs-Petitioners, v. Nathalie ASHER, Field Office Director; Sara R. SALDAÑA, Director, Immigration and Customs Enforcement; Jeh JOHNSON, Secretary of the Department of Homeland Security; Loretta E. LYNCH, Attorney General of the United States; Juan P. OSUNA, Director of Executive Office for Immigration Review; Lowell CLARK, Warden, Defendants-Respondents.	Civil Action No. 2:16-cv-01454-JLR-BAT Agency Nos. A 089 091 010 A 098 225 790 A 206 104 257 AMENDED PETITION FOR WRIT OF HABEAS CORPUS AND CLASS ACTION COMPLAINT

I. Introduction

1. Plaintiffs-Petitioners Arturo Martinez Baños ("Mr. Martinez"), Edwin Flores Tejada ("Mr. Flores"), German Ventura Hernandez ("Mr. Ventura"), and the class they seek to

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represent ("Plaintiffs") are subjected to unlawful and prolonged detention, without an opportunity for a custody hearing as a result of Defendants' determination that Immigration Judges do not have jurisdiction to conduct custody hearings (also known as bond hearings) for persons fleeing persecution and torture, who are placed in "withholding only" proceedings under 8 C.F.R. § 1208.31(e).

2. Defendants' erroneous interpretation of the statute directly flouts controlling case law from the Ninth Circuit Court of Appeals, making clear that persons in immigration proceedings who face prolonged detention—detention of six months or longer—are entitled to a custody hearing. *See Rodriguez v. Robbins (Rodriguez III)*, 804 F.3d 1060 (9th Cir. 2015), *cert. granted sub nom. Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016); *Diouf v. Napolitano* (*Diouf II*), 634 F.3d 1081 (9th Cir. 2011); *Casas–Castrillon v. Department of Homeland Security*, 535 F.3d 942 (9th Cir.2008); *Prieto–Romero v. Clark*, 534 F.3d 1053, 1059 (9th Cir. 2008).

3. Plaintiffs are being unlawfully denied the opportunity to even seek a custody redetermination from a neutral arbiter who determines whether that individual presents a flight risk or threat to the community, or whether the noncitizen is entitled to be released during the lengthy immigration proceedings.

4. There is no legal authority for Defendants' policy and practice of denying Plaintiffs, noncitizens in withholding only proceedings, custody hearings before an Immigration Judge when faced with prolonged detention, *regardless* of which immigration statute authorizes the initial detention. *See Rodriguez v. Robbins (Rodriguez II)*, 715 F.3d 1127, 1139 (9th Cir. 2013) (concluding that as suggested by *Diouf II*, "immigration detention becomes prolonged at the six-month mark regardless of the authorizing statute.").

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5. Moreover, Defendants' interpretation also violates Plaintiffs' right to obtain a custody hearing before an Immigration Judge when *first* transferred from the summary reinstatement proceedings to withholding only proceedings. Defendants' assertion that noncitizens in withholding only proceedings are detained based on a final order pursuant to 8 U.S.C. § 1231(a) is contrary to *Guerra v. Shanahan*, -- F.3d --, 2016 WL 4056035 (2d Cir. July 29, 2016), the only federal court of appeals decision squarely addressing this issue.

6. Rejecting Defendants' position, the Second Circuit determined that persons in withholding only proceedings are detained under 8 U.S. C. § 1226(a), as opposed to § 1231(a). This analysis is critical as it clarifies that Plaintiffs do not need to first suffer through six months of detention before obtaining a custody hearing from an Immigration Judge. Instead, once Defendants have referred Plaintiffs to withholding only proceedings, Plaintiffs are immediately eligible to request a custody hearing pursuant to 8 C.F.R. § 1236.1(d).

7. While the Ninth Circuit has not yet squarely addressed this issue, several of its decisions strongly reinforce the Second Circuit's analysis. *See Rodriguez* III, 804 F.3d at 1086 (where immigration proceedings are still pending, including administrative or judicial review, "the non-citizen has not been 'ordered removed,' and the removal period has not begun, so § 1231(a) is inapplicable" (*citing Owino v. Napolitano*, 575 F.3d 952, 955 (9th Cir. 2009) ("[W]hile administrative proceedings are pending on remand, Owino will not be subject to a *final* order of removal, so § 1231 cannot apply."))); *Ortiz–Alfaro v. Holder*, 694 F.3d 955, 958 (9th Cir. 2012) (holding that, in determining whether the Court has jurisdiction over a petition for review, where noncitizen was placed in withholding only proceedings, there is no final administrative order until after the IJ and BIA complete withholding only proceedings and any administrative appeal).

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8. Defendants preclude Plaintiffs from obtaining custody hearings by refusing to acknowledge that noncitizens in withholding only proceedings are detained pursuant to 8 U.S.C. § 1226, and thus eligible to seek a custody determination from an Immigration Judge pursuant to 8 C.F.R. § 1236.1(d). Instead, Defendants continue to assert that Plaintiffs remain subject to mandatory detention under 8 U.S.C. § 1231(a)(2) because they have final orders of removal, even though Defendants have determined that Plaintiffs possess a reasonable fear of persecution or torture and accordingly have transferred Plaintiffs from summary reinstatement proceedings to withholding only proceedings before the Immigration Judge.

9. As a result of Defendants' policies and practices rejecting the authority of Immigration Judges to conduct custody hearings for Plaintiffs under 8 U.S.C. § 1226, persons in withholding only proceedings remain locked up in federal facilities and private prisons like the Northwest Detention Center for several months, often in excess of a year, and sometimes for multiple years.

10. Plaintiffs' detention without a custody hearing where they have the opportunity to demonstrate that they should be released on bond or on their own recognizance, violates both the Immigration and Nationality Statute, 8 U.S.C. § 1101 *et seq.*, and the United States Constitution.

11. Through this action Mr. Martinez, Mr. Flores, and Mr. Ventura, on behalf of themselves and proposed Class Members, request this Court declare that noncitizens placed in withholding only proceedings are not subject to detention under 8 U.S.C. § 1231(a), but instead their detention is authorized by § 1226(a), and enjoin Defendants from denying Plaintiffs custody hearings pursuant to 8 C.F.R. § 1236.1(d).

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12. Moreover, Mr. Martinez, Mr. Flores, and Mr. Ventura request that this Court provide relief for themselves and all Plaintiffs facing prolonged detention, clarifying that pursuant to controlling case law from the Ninth Circuit Court of Appeals, individuals who have been placed in withholding only proceedings are entitled to automatic custody hearings once their detention reaches six months, where Defendants bear the burden of justifying the continued detention with clear and convincing evidence.

II. Parties

13. Plaintiff-Petitioner Arturo Martinez Baños is a native and citizen of Mexico, who is currently residing in Othello, Washington. He was previously detained at the Northwest Detention Center in Tacoma, Washington, before he was released on a $10,000 bond.

14. Plaintiff-Petitioner Edwin Flores Tejada is a native and citizen of El Salvador, who is currently detained at the Northwest Detention Center in Tacoma, Washington. He has been detained since December 21, 2015.

15. Plaintiff-Petitioner German Ventura Hernandez is a native and citizen of Mexico, who is currently detained at the Northwest Detention Center in Tacoma, Washington. He has been detained since October 18, 2016.

16. Defendant-Respondent Nathalie Asher is the Field Office Director for the Seattle District of Immigration and Customs Enforcement ("ICE"), an agency of the United States. The Field Officer Director enforces all custody determinations of Plaintiffs-Petitioners and of other members of the proposed Class. Director Asher thus has custody over the named Plaintiffs and proposed Class Members. She is sued in her official capacity.

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17. Defendant-Respondent Sara R. Saldaña is the Director of Immigration & Customs Enforcement. ICE is the agency within the Department of Homeland Security ("DHS") that is responsible for apprehension, detention, and removal of noncitizens from the United States. Director Saldaña is a legal custodian of the named Plaintiffs and proposed Class Members. She is sued in her official capacity.

18. Defendant-Respondent Jeh Johnson is the Secretary of the Department of Homeland Security, an agency of the United States. He is named in his official capacity.

19. Defendant-Respondent Juan P. Osuna is the Director of the Executive Office for Immigration Review ("EOIR"), an agency within the Department of Justice responsible for the immigration courts and Board of Immigration Appeals ("BIA"). He is named in his official capacity.

20. Defendant-Respondent Loretta E. Lynch is the Attorney General of the United States and the most senior official in the Department of Justice. She has the authority to interpret the immigration laws and adjudicate removal cases. By regulation, the Attorney General delegates this responsibility to the immigration courts and the BIA, which are administered by EOIR. She is named in her official capacity.

21. Defendant-Respondent Lowell Clark is the warden of the Northwest Detention Center, operated by the GEO Group, Inc., under contract with the Department of Homeland Security. Defendant Clark is sued in his official capacity because he has custody of detained Plaintiffs.

III. Custody

22. Mr. Martinez is currently released from the Northwest Immigration Detention Center and residing at his home in Othello, Washington. However, as the BIA has sustained

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Defendant ICE's appeal and declared that the Immigration Judge had no authority to conduct a custody hearing, Mr. Martinez is subject to immediate detention, at Defendants' discretion. As such, he remains in the constructive custody of Defendant Asher, who directs ICE detention and enforcement operations in Washington State.

23. Mr. Flores has been detained at the Northwest Detention Center since December 21, 2015, and is thus subject to the custody of Defendant Asher. On August 30, 2016—after 253 days of detention—the Immigration Judge denied Mr. Flores's request for bond on the ground that she lacked jurisdiction because he is in withholding only proceedings. Ex. B at 2.

24. Mr. Ventura has been detained at the Northwest Detention Center since October 18, 2016, and is thus subject to the custody Defendant Asher.

25. Proposed Class Members, all of whom remain in custody at the Northwest Detention Center or are subject to an order of detention there, while in withholding only proceedings in the Western District of Washington.

IV. Jurisdiction and Venue

26. This action arises under the Constitution of the United States, the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq*., and the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq*.

27. This Court has jurisdiction under Article 1, section 9, clause 2 of the United States Constitution (Suspension Clause); 28 U.S.C. § 2241 (habeas corpus); 28 U.S.C. §§ 1331 (federal question), 1361, and 1651 (All Writs Act).

28. This Court may grant declaratory and injunctive relief pursuant to 28 U.S.C. § 2241, 5 U.S.C. § 702, 28 U.S.C. § 1651, and 28 U.S.C. § 2202.

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29. Plaintiffs-Petitioners have exhausted any and all administrative remedies to the extent required by law.

30. Venue is proper in the Western District of Washington under 28 U.S.C. §§ 1391(e) and 1402 where Defendant Asher resides and where custody determinations are made with respect to the named Plaintiffs and proposed Class Members.

V. Legal Background

Reinstatement Proceedings and Withholding Only Proceedings

31. Mr. Martinez, Mr. Flores, Mr. Ventura, and all putative Class Members are persons, who were previously ordered removed, thereafter re-entered the United States without inspection, and were subsequently encountered by U.S. immigration authorities. Consequently, they are all subject to an administrative removal process under 8 U.S.C. § 1231(a)(5) known as a reinstatement of removal.

32. Pursuant to the implementing regulations, persons subject to reinstatement of removal are not provided an opportunity to appear in front of an Immigration Judge. 8 C.F.R. § 241.8(a). Instead, they are placed through an expedited process where an ICE official issues an order of removal predicated upon the person's prior removal order and subsequent unlawful reentry. The person is then summarily removed from the country.

33. However, an "exception" to the summary removal process exists for a noncitizen, who expresses a fear of being persecuted or tortured if returned to their home country. 8 C.F.R. § 241.8(e). In such a case the noncitizen is interviewed by an asylum officer to determine if she or he has a reasonable fear of persecution or torture. *Id.* If an asylum officer determines that the person has a reasonable fear they are then transferred from the summary reinstatement process into full proceedings before an Immigration Judge called "withholding only proceedings." 8

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C.F.R. § 208.31(e). *See also* 8 C.F.R. § 1208.2(c)(3)(i) (while the scope is limited to applications for withholding of removal and relief under the Convention Against Torture, cases referred for withholding only proceedings "shall be conducted in accordance with the same rules of procedure as proceedings under 8 C.F.R. part 240, subpart A.").

34. Because Defendants have already determined that Mr. Martinez, Mr. Flores, Mr. Ventura, and all Plaintiffs have a reasonable fear of persecution or torture, they have all been referred for full proceedings before an Immigration Judge where they have an opportunity to apply for withholding of removal and/or relief under the Convention Against Torture. *See* 8 C.F.R. § 1208.31(e). Moreover, Plaintiffs have the right to an administrative appeal to the BIA (and thereafter to seek judicial review before the federal court of appeals) if they are not granted either withholding of removal under 8 U.S.C. § 1231(b)(3), or relief under the Convention Against Torture, 8 C.F.R. § 1208.16(c). *See* 8 C.F.R. § 1208.31(e).

Statutory Authority for Detention in Withholding Only Proceedings.

35. Notwithstanding the fact that Plaintiffs have been transferred to immigration proceedings before Immigration Judges, Defendants assert that Plaintiffs remain subject to mandatory detention under 8 U.S.C. § 1231(a).

36. Defendants assert that Immigration Judges have no jurisdiction to make custody determinations for persons subject to reinstatement of removal under 8 U.S.C. § 1231(a)(5). Defendants purport to detain persons subject to reinstatement of removal throughout the removal proceeding, relying on the authority of 8 U.S.C. § 1231(a)(2), which requires that noncitizens be detained "[d]uring the removal period." The statute defines the removal period as beginning on the "date the order of removal becomes administratively final" (unless the

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person seeks judicial review or is confined by authorities other than immigration officials). 8 U.S.C. § 1231(a)(1)(B).

37. However, both binding case law and the controlling statute make clear that Plaintiffs are not subject to a final administrative order until the withholding only proceedings are concluded, including any administrative appeal. *See Rodriguez III,* 804 F.3d at 1086; *Ortiz-Alfaro,* 694 F.3d at 958; 8 U.S.C. § 1101(a)(47(B) (removal order is not final until both the Immigration Judge and the BIA complete review).

38. 8 U.S.C. § 1226 authorizes the detention of a noncitizen "pending a decision on whether the [noncitizen] is to be removed from the United States." Plaintiffs submit that because withholding of removal proceedings are now pending before the agency, their detention is governed by § 1226, not § 1231(a).

39. For a person detained under § 1226, subject to limited exceptions laid out in subsection (c), ICE may detain the noncitizen or release her subject to parole or a bond. If ICE elects to detain the noncitizen, the noncitizen may request a custody redetermination hearing before an Immigration Judge. 8 C.F.R. § 1236.1(d)(1).

40. 8 U.S.C. § 1231(a), by contrast, only governs the detention of noncitizens, who are subject to a final order of removal. This section defines a 90-day "removal period" after a removal order becomes "administratively final"; during the removal period, detention is required. 8 U.S.C. § 1231(a)(1)-(2).

41. "Where a [noncitizen] falls within this statutory scheme can affect whether his detention is mandatory or discretionary, as well as the kind of review process available to him if he wishes to contest the necessity of his detention." *Prieto–Romero v. Clark,* 534 F.3d 1053, 1057 (9th Cir. 2008).

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42. The Second Circuit is the only Court of Appeals to squarely address whether a person in withholding only proceedings is detained pursuant to § 1226 or § 1231(a). *Guerra*. In *Guerra*, the Court of Appeals unequivocally held that § 1226, not § 1231, provides the statutory authority for any detention during withholding only proceedings because there are clearly ongoing administrative proceedings: "8 U.S.C. § 1226(a) permits detention of an [noncitizen] 'pending a decision on whether the [noncitizen] is to be removed from the United States.' The statute does not speak to the case of whether the [noncitizen] is theoretically removable but rather to whether the [noncitizen] will actually be removed. An [noncitizen] subject to a reinstated removal order is clearly removable, but the purpose of withholding-only proceedings is to determine precisely whether 'the [noncitizen] is to be removed from the United States.' 8 U.S.C. § 1226(a)." *Guerra*, at *2.

43. The Court further explained, "8 U.S.C. § 1226(a) authorizes the detention of [noncitizens] whose removal proceedings are ongoing. By contrast, 8 U.S.C. § 1231(a) is concerned mainly with defining the 90-day removal period during which the Attorney General 'shall remove the [noncitizen].'" *Id.* at *3.

44. Even prior to the Second Circuit's decision in *Guerra*, the Ninth Circuit 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*, 694 F.3d at 958. *See also Luna-Garcia v. Holder*, 777 F.3d 1182 (10th Cir. 2015) (same); *cf. Chupina v. Holder*, 570 F.3d 99, 103-04 (2d Cir. 2009) (agency order is not final where applications for withholding of removal or relief under the

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Convention Against Torture are pending before the Immigration Judge or the BIA—even if there is no further ability to challenge the finding of removability).

45. Defendants contend that the analysis in *Ortiz-Alfaro* should be limited to determining the finality of a reinstated removal order for purposes of seeking judicial review, and disregarded with respect to determining "the finality of a reinstated removal order with respect to the . . . the source of the detention authority and the Immigration Judge's jurisdiction to consider a custody redetermination request." Ex. A BIA Order at 2.

46. However, as the Second Circuit succinctly stated, Defendants "point to no authority for this proposition, however, and we have never recognizes 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))." *Guerra*, at *3.

47. While the Ninth Circuit Court of Appeals has not yet directly addressed this issue, decisions from the Western District have split upon whether persons in withholding only proceedings are detained pursuant to § 1226 or § 1231. *See Martinez Mendoza v. Asher*, C14–0811JCC, Dkt. # 14 (W.D.Wash. Sept. 16, 2014) (individual was detained under § 1226 and entitled to a custody hearing); *Acevedo-Rojas v. Clark*, No. C14-1323-JLR, 2014 WL 6908540, at *5 (W.D. Wash. Dec. 8, 2014) (ruling instead that § 1231(a) formed the basis of detention); *Giron-Castro v. Asher*, No. C14-0867JLR, 2014 WL 8397147, at *2 (W.D. Wash. Oct. 2, 2014) (same); *Gonzalez v. Asher*, 2016 U.S. Dist. LEXIS 29710, *12 (W.D. Wash. Feb. 16, 2016) (deciding that the Court need not determine whether noncitizen is detained pursuant to §

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1226 or § 1231 as petitioner is entitled to bond hearing under either statute because he has been detained by ICE for more than six months).

48. However, *Acevedo-Rojas* and *Giron-Castro* did not have the benefit of the Second Circuit's analysis in *Guerra*. In addition, neither of those cases had the benefit of the Ninth Circuit's recent opinion in *Rodriguez III*, in which the Court clarified that there was no need for a separate § 1231(a) prolonged detention subclass, because individuals with pending immigration proceedings (persons in withholding only proceedings) continue to be detained under § 1226: "if a non-citizen has received a stay of removal from the BIA pending further administrative review, then the order of removal is not yet 'administratively final.' 8 U.S.C. § 1231(a)(1)(B)(i). The non-citizen has not been 'ordered removed,' and the removal period has not begun, so § 1231(a) is inapplicable." *Rodriguez III*, 804 F.3d at 1086. As such, binding Ninth Circuit case law emphatically reinforces the Second Circuit's holding in *Guerra*.

49. Because persons in withholding only proceedings are detained under § 1226 and not § 1231 they are immediately eligible to seek a custody hearing before an Immigration Judge. *See Guerra*, at *2 ("The answer to this question determines whether Guerra's detention is governed by § 1231(a) or instead by § 1226(a), and, in turn, whether he was eligible to be released on bond").

Prolonged Detention Is Not Authorized by Either 8 U.S.C. §1226 or §1231

50. Even where persons are subject to mandatory detention, the Ninth Circuit has repeatedly made clear that the general immigration statutes do not authorize prolonged detention without a custody hearing. *See, e.g.*, *Rodriguez II*, 715 F.3d at 1133 ("the canon of constitutional avoidance requires us to construe the government's statutory mandatory

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detention authority under Section 1226(c) and Section 1225(b) as limited to a six-month period, subject to a finding of flight risk or dangerousness.").

51. There is simply no legal authority for Defendants to justify their refusal to afford the named Plaintiffs and proposed Class Members individualized custody hearings when they have been detained for six months. Rather, Defendants continue to flout controlling case law from the Ninth Circuit Court of Appeals. *See Rodriguez III*, 804 F.3d at 1065 ("This is the latest decision in our decade-long examination of civil, i.e. non-punitive and merely preventative, detention in the immigration context.").

52. In *Casas–Castrillon* and *Prieto–Romero* the Ninth Circuit first examined the interplay between § 1226 and § 1231 in removal proceedings. The Court ruled that persons who filed petitions for review and obtained a stay of removal, continued to be detained under § 1226—even though the administrative order was now final. *See Prieto-Romero*, 534 F.3d at 1060 ("§ 1231(a) authorizes detention only '[d]uring the removal period,' § 1231(a)(2), and 'beyond the removal period,' § 1231(a)(6), it clearly does not provide any authority *before* the removal period."); *Casas-Castrillon*, 535 F.3d at 947 (noncitizen originally detained under mandatory detention provision at § 1226(c) who files petition for review of final administrative order is then detained under discretionary detention provision at § 1226(a), not § 1241(a)).

53. The Ninth Circuit next concluded that even where there is already a final order of removal (i.e., there are no longer pending removal proceedings) and thus the noncitizen is detained pursuant to § 1231(a), that such a person is entitled to an individualized custody hearing before an immigration judge when facing prolonged detention. *Diouf II*, 634 F.3d at 1092. The Court of Appeals further made clear that prolonged detention occurs when the noncitizen is detained for six months. *Id.* at 1091.

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54. Then in a series of three separate decisions addressing a class action for detainees in the Central District of California facing prolonged detention under the general detention statutes, including 8 U.S.C. §§ 1225(b), 1226, and 1231(a), *see Rodriguez v. Hayes (Rodriguez I)*, 591 F.3d 1105, 1113 (9th Cir. 2010), the Court of Appeals definitively clarified that noncitizens detained pursuant to the general detention statutes are entitled to automatic custody hearings before an Immigration Judge if they are detained for six months or longer. *Rodriguez III*, 804 F.3d at 1085.

55. In addition, in the cases of prolonged immigration detention, the burden of proof transfers to the government, which must then demonstrate with clear and convincing evidence why the noncitizen should not be released. *Id.* at 1087, *citing Singh v. Holder*, 638 F.3d 1196, 1203, 1208 (9th Cir. 2011).

56. Without the benefit of the Court of Appeals' decisions in *Guerra* and *Rodriguez III*, the Western District Court was split on determining the underlying statutory authority for detaining noncitizens in withholding proceedings. But *all* agreed that, regardless of the authorizing statute, noncitizens are entitled to an individualized bond hearing once they have been detained for six months by immigration authorities. For example, in *Giron-Castro* this Court granted the habeas petition ordering that the petitioner be granted an individualized bond hearing with 14 days of the date of the order based on his prolonged detention even though the petitioner was detained under § 1231(a). 2014 WL 8397147, at *1. In *Gonzalez* this Court held it need not even determine whether the petitioner was detained under § 1226 or § 1231, as either way he was entitled to a bond hearing because he had been detained for more than six months. *Gonzalez*, 2016 U.S. Dist. LEXIS 29710, *12.

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VI. Factual Allegations

Plaintiff-Petitioner Martinez

57. Plaintiff Martinez is a 36-year-old native and citizen of Mexico who is currently in withholding only proceedings based on his fear of persecution and torture if forcibly returned to Mexico.

58. Mr. Martinez first entered the United States around 1997 without any lawful status. Since that time he has lived primarily in Washington State, and currently lives on a small orchard with his former employers, who have taken him in as part of their family. He has worked for or lived with this same family since around 2006.

59. Mr. Martinez was placed in removal proceedings and ordered removed after having been convicted of possession of a controlled substance in 2009. He then returned to the United States without permission later in 2009 and was summarily removed. He then reentered without inspection, and in 2012 was convicted of Misprision of a Felony. While he was serving prison time for this conviction, he was accused by fellow defendants of providing information about them to U.S. law enforcement agents.

60. In 2013, after completing his sentence, Mr. Martinez was again removed to Mexico. In Mexico, he was kidnapped, beaten, sodomized, and psychologically tortured by uniformed police officers from Petatlan, who held him for ransom, which was ultimately paid by his former employers in Washington State.

61. After he was released from this ordeal, he attempted to enter the United States unsuccessfully three times before he was able to evade detection in mid-2013. However, in 2014, he was charged with Assault in the fourth degree, which charge was dismissed after Mr. Martinez complied with a Stipulated Order of Continuance.

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62. In March of 2015, Mr. Martinez was apprehended by ICE and served with a Notice of Intent to Reinstate his 2009 removal order. He was detained at the Northwest Detention Center in Tacoma. He expressed fear of return to Mexico and underwent a Reasonable Fear Interview pursuant to 8 C.F.R. § 208.31(b). The Asylum Office found that Mr. Martinez demonstrated a reasonable fear of torture by the Petatlan police, who previously tortured him with impunity, as well as by the members of the cartel related drug trafficking operation, who suspect Mr. Martinez of providing prejudicial information about them to U.S. law enforcement.

63. On October 8, 2015, after Mr. Martinez had been detained in immigration custody for over six months, the Immigration Court conducted a custody hearing, 196 days after Mr. Martinez was first placed in immigration custody.

64. Immigration Judge Fitting determined that in light of the ongoing withholding only proceedings based on the asylum officer's finding that Mr. Martinez possesses a reasonable fear of persecution or torture if returned to Mexico, and his strong community ties, and notwithstanding his past offenses, DHS had failed to carry its burden of demonstrating with clear and convincing evidence that Mr. Martinez presented either a flight risk or a danger to the community. As such, Judge Fitting set a bond in the amount of $10,000, upon payment of which Mr. Martinez was released from the Northwest Detention Center and returned to live at his home, at the residence of his former employer.

65. However, ICE filed a notice of appeal to the BIA, challenging the Immigration Judge's authority to grant a bond to a person like Mr. Martinez, who is currently in withholding only proceedings.

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66. On June 28, 2016, Mr. Martinez attended his non-detained preliminary withholding hearing at the Seattle Immigration Court. The Immigration Judge scheduled Mr. Martinez' merits hearings for September 28, 2018.

67. On July 27, 2016, a three-member panel of the BIA issued a split decision, reversing the Immigration Judge's custody determination. The majority opinion found that "the Immigration Judge lacked jurisdiction to consider [Mr. Martinez's] request to be released from custody." *See* Exh. A, BIA Order at 1. Specifically the Board found that "[c]ontrary to the respondent's argument on appeal, the DHS's detention authority stems from 241(a) of the Act [8 U.S.C. § 1231(a)(1)], not section 236(a) [8 U.S.C. § 1226(a)], because respondent is subject to an administratively final removal order that has been reinstated." *Id.*

68. Further, the Board found that "[a]n Immigration Judge's authority to redetermine custody conditions is limited to [noncitizens] who have been issued a Notice to Appear and placed into removal proceedings under section 240 [8 U.S.C. § 1229a]." Finally, the Board acknowledged that "while the United States Court of Appeals for the Ninth Circuit has held that certain [noncitizens] are required to be provided custody redetermination hearings after 180 days in detention, [noncitizens] detained under section 241(a) of the Act [8 U.S.C. § 1231(a)] are specifically excluded from that class." *Id.* at 2.

69. The Board vacated the Immigration Judge's decision granting a $10,000 bond and ordered that "[t]he respondent shall be detained without bond pending proceedings." *Id.* at 3.

70. In a dissenting opinion Board Member Grant opined that "the clear language in *Rodriguez III* provides that a [noncitizen] such as [Mr. Martinez], whose removal is subject to further administrative review before an Immigration Judge on his application for withholding

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of removal, is not being detained pursuant to section 241(a) of the Act and thus is entitled to the bond redetermination hearing mandated by that decision." *Id.* at 4.

71. As a result of the Board's decision, Immigration Judges in Tacoma now deny custody redetermination requests by proposed Class Members who have been in detention for more than six months based on Defendants' interpretation that the Immigration Judges do not have jurisdiction over such requests by persons in withholding only proceedings.

72. The Immigration Court in Tacoma now utilizes a bond template sheet that includes a check mark box for denying custody determinations based on "No Jurisdiction" with a category for "Withholding Only Proceedings." *See* Exh. B.

Plaintiff-Petitioner Flores

73. Plaintiff Flores is a 35-year-old native and citizen of El Salvador who is currently in withholding only proceedings based on his fear of persecution and torture if forcibly returned to El Salvador.

74. Mr. Flores first came to the United States in 2001. In November 1999, before coming to the United States, Mr. Flores was brutally attacked by members of the Mara Salvatrucha ("MS-13") gang for refusing to join them. The gang members beat him using sticks and rods, causing him severe injuries. Around two weeks later Mr. Flores fled to Mexico, where one of his brothers was living after also having fled from gang recruitment. After living in Mexico for around a year, in 2001, Mr. Flores entered the United States without inspection and began to live in Michigan.

75. In 2005 Mr. Flores was convicted for operating a vehicle while impaired and sentenced to one day in jail. He was subsequently placed in removal proceedings. In 2006, he

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was ordered removed by an Immigration Judge, but did not depart until January 2014, when Mr. Flores was apprehended by immigration authorities and removed to El Salvador.

76. After returning to El Salvador, Mr. Flores was told by a friend that the MS-13 gang members were still investigating him. Around two weeks after arriving in El Salvador, Mr. Flores once again fled to Mexico. There, he was kidnapped and threatened for being Salvadoran. Around April 2014, after being released by the kidnappers, Mr. Flores returned to the United States. He was apprehended by Border Patrol officers, then convicted for improper entry under 8 U.S.C. § 1325 and sentenced to 75 days in jail. In July 9, 2014, Mr. Flores was removed to El Salvador, but he immediately returned to the United States out of fear. He began to live in SeaTac, Washington, with his family, including two children born in the United States.

77. On December 21, 2015, Mr. Flores was apprehended by ICE officers and transported to the Northwest Detention Center. On January 11, 2016, Mr. Flores underwent a Reasonable Fear Interview pursuant to 8 C.F.R. § 208.31(b). The Asylum Office found that Mr. Flores demonstrated a reasonable fear of torture by the MS-13, who previously persecuted him on account of his membership in his nuclear family.

78. On August 30, 2016, after 253 days in detention, Mr. Flores appeared before the Immigration Court for a custody redetermination hearing. Immigration Judge Fitting denied his request for a bond hearing on the basis that she lacks jurisdiction to order his release because he is in withholding only proceedings. Ex. B at 2.

79. Mr. Flores appealed the Immigration Judge's denial. That appeal is currently pending before the BIA.

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Plaintiff-Petitioner Ventura

80. Plaintiff Ventura is a 23-year-old citizen and national of Mexico who is currently in withholding only proceedings based on his fear of persecution and torture if forcibly returned to Mexico.

81. In January 2014, Mr. Ventura was beaten and threatened by residents of a rival town and members of its football team. He reported the incident to the police, but the police did not take any measures. Men from the rival team subsequently returned to his house with weapons, threatening to kill him for reporting them to the police. For several weeks, Mr. Ventura continued to receive death threats at his home. In March 2014, the attackers encountered Mr. Ventura at a market, beat him with rocks, and attempted to run him over with a car.

82. Mr. Ventura fled from Mexico and entered the United States without inspection around March 16, 2016. He was apprehended by immigration authorities near the border and removed to Mexico. Around 10 days later, Mr. Ventura returned to the United States and entered without inspection.

83. On June 1, 2016, Mr. Ventura was convicted for driving under the influence of alcohol in Oregon. He was sentenced to a 12-month diversion program and immediately began to comply with the court-ordered sentence.

84. On October 18, 2016, Mr. Ventura was apprehended by ICE officers at his home and transported to the Northwest Detention Center. On November 3, 2016, Mr. Flores underwent a Reasonable Fear Interview pursuant to 8 C.F.R. § 208.31(b). The Asylum Office found that Mr. Ventura had demonstrated a reasonable possibility of torture upon removal to Mexico. Ex. C at 1.

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85. Pursuant to Defendants' policy and practice, Mr. Ventura is not eligible for an individualized custody redetermination hearing before an Immigration Judge even though he has been referred to the Immigration Court for withholding only proceedings.

V. Class Action Allegations

86. Plaintiffs–Petitioners bring this action pursuant to Federal Rules of Civil Procedure 23(a) and 23(b) on behalf of themselves and all other persons similarly situated. The proposed class is defined as follows:

> All individuals who are placed in withholding only proceedings under 8 C.F.R. § 1208.31(e) in the Western District of Washington who are detained or subject to an order of detention.

87. The requirements of Rule 23(a)(1) are met in this case because the class is so numerous that joinder of all members is impracticable. Upon information and belief there are currently over eighty individuals detained at the Northwest Detention Center who fall within the proposed class and several hundred are detained at the Northwest Detention Center over the course of a year. Moreover, the inherent transitory state of the putative Class Members further demonstrates that joinder is impracticable.

88. The proposed class meets the commonality requirements of Federal Rule of Civil Procedure 23(a)(2) because the mandatory detention of individuals within the proposed class is the result of Defendants' unlawful interpretation of the detention statutes and removal provisions at 8 U.S.C. §§ 1226, 1231.

89. The proposed class meets the typicality requirements of Federal Rule of Civil Procedure 23(a)(3) because the claims of the named Plaintiffs are typical of the claims of the class. The named Plaintiffs and the class of individuals they seek to represent have all been subjected to mandatory detention despite being placed into ongoing removal proceedings after

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asylum officers have determined that they possess a reasonable fear of persecution or torture if returned to their home countries. As such, they are not subject to a final order under 8 U.S.C. § 1231(a) but instead are subject to the detention provisions at § 1226. Moreover, all are similarly "entitled to automatic bond hearings after six months of detention." *Rodriguez III*, 804 F.3d at 1085.

90. The proposed class meets the requirements of Federal Rule of Civil Procedure 23(a)(4) on adequacy of representation. The named Plaintiffs seek the same relief as the other members of the class, namely the right to an individualized custody determination by an Immigration Judge, and do not have any interests adverse to those of the class as a whole. In addition, the proposed class is represented by counsel from the Northwest Immigrant Rights Project. Counsel has extensive experience litigating class action lawsuits, including lawsuits on behalf of immigration detainees.

91. Finally, the proposed class satisfies Federal Rule of Civil Procedure 23(b)(2) because the immigration authorities have acted on grounds generally applicable to the class in applying an erroneous interpretation of § 1231(a) to members of the proposed class. Thus, final injunctive and declaratory relief is appropriate with respect to the class as a whole. *Cf. Rodriguez I*, 591 F.3d at 1119-20 (8 U.S.C. § 1252(f) does not bar declaratory relief, nor injunctive relief where "Petitioner here does not seek to enjoin the operation of the immigration detention statutes, but to enjoin conduct it asserts is not authorized by the statutes.").

VI. Claims for Relief

First Cause of Action—Violation of 8 U.S.C. § 1226 for failure to Provide Immediate Custody Hearings.

92. The foregoing allegations are realleged and incorporated herein.

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93. 8 U.S.C. § 1226(a) authorizes Defendants to release non-citizens who have pending removal proceedings, including Plaintiff and Class Members who are placed in withholding only proceedings under 8 C.F.R. 1208.31(e), "[e]xcept as provided in [1226] subsection (c)."

94. *Guerra*, *Rodriguez III*, and *Ortiz-Alfaro*, all confirm that Plaintiffs-Petitioners and putative Class Members are subject to detention under 8 U.S.C. § 1226(a), based on their ongoing immigration proceedings. As they do not have final orders, they are not subject to detention pursuant to § 1231(a).

95. Defendants' policy and practice of detaining Class Members without the opportunity for an individualized bond hearing violates 8 U.S.C. § 1226(a), and is therefore unlawful.

Second Cause of Action— Violation of 8 U.S.C. § 1101 *et seq*. for failure to Provide Automatic Custody Determinations at Six Months of Detention.

96. The foregoing allegations are realleged and incorporated herein.

97. The Due Process Clause of the Fifth Amendment to the United States Constitution requires that detention be reasonably related to its purpose. Prolonged detention without an individualized determination of an individual's dangerousness or flight risk is constitutionally doubtful. *Rodriguez II*, 715 F.3d at 1137-38. In order to avoid the constitutional concerns the detention statutes must be construed to contain an implicit reasonable time limitation. *Rodriguez III*, 804 F.3d at 1079.

98. Accordingly, the named Plaintiffs and putative Class Members are all "entitled to automatic bond hearings after six months of detention." *Rodriguez III*, 804 F.3d at 1085. Defendants' policy and practice of mandatorily detaining the named Plaintiffs and Class

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Members who are subjected to prolonged detention violates the clear holdings of the Court of Appeals requiring Defendants to justify prolonged detention beyond six months.

Third Cause of Action—Violation of Due Process Clause.

99. The foregoing allegations are realleged and incorporated herein.

100. The Due Process Clause of the Fifth Amendment to the United States Constitution requires that civil immigration detention be limited to its purpose of preventing flight risk and danger to the community, and is accompanied by strong procedural protections to ensure that detention is serving those goals.

101. Mandatory detention is not reasonably related to its purpose when applied to individuals such as Plaintiffs-Petitioners and Class Members, who have been placed in full immigration proceedings after being found by asylum officers to have a reasonable fear of persecution or torture pursuant to 8 C.F.R. § 208.31(e), and who retain the right to file an administrative appeal and seek judicial review before the Federal Court of Appeals if they are not granted protection from removal by the Immigration Judge or BIA.

102. Defendants' policy and practice of denying Plaintiffs-Petitioners and Putative Class Members individualized custody determinations before an Immigration Judge violates the Due Process Clause of the United States Constitution, and is therefore unlawful.

VII. Request for Relief

Plaintiffs-Petitioners request this Court to grant the following relief:

1. Grant a writ of habeas corpus ordering Defendants to refrain from vacating the Immigration Judge's custody determination for Mr. Martinez;

2. Certify this case as a class action lawsuit, as proposed herein, appoint the named Plaintiffs as class representatives, and appoint the undersigned counsel as class counsel;

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3. Declare Defendants' interpretation of the statute and policy denying the named Plaintiffs and Class Members an opportunity to seek custody hearings under 8 U.S.C. § 1226 as unlawful, and their practice of applying mandatory detention to Plaintiffs in violation of the Immigration and Nationality Act, or in the alternative, the United States Constitution;

4. Order Defendants to cease and desist from holding the named Plaintiffs and Class Members in detention without an individualized custody determination before an Immigration Judge;

5. Order the Defendants to automatically provide individualized custody hearings to all Plaintiffs on or before they have been detained for six months in immigration custody;

6. Grant an award of attorney's fees and costs;

7. Grant such other relief as may be just and reasonable.

Dated this 31st day of January, 2017.

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/s/ Matt Adams

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CERTIFICATE OF SERVICE

I hereby certify that today, January 31, 2017, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all parties of record.

s/ Leila Kang

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