IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.

CANDAL NGUYEN,

Petitioner/Plaintiff,

v.

ALBERTO GONZALEZ, Attorney General of the United States,

MICHAEL CHERTOFF, Secretary of the Department of Homeland Security,

MICHAEL GARCIA, Assistant Secretary for Immigration and Customs Enforcement, Department of Homeland Security,

DOUGLAS MAURER, Field Office Director, Office of Detention and Removal, Immigration and Customs Enforcement, Department of Homeland Security, and

J. ALEXANDER, Warden, Global Expertise Outsourcing Contract Detention Facility,

Respondents/Defendants.

VERIFIED PETITION FOR A WRIT OF HABEAS CORPUS AND COMPLAINT FOR DECLARATORY RELIEF

INTRODUCTION

1. U.S. Immigration and Customs Enforcement (ICE) has been detaining Petitioner Candal Nguyen under an order of removal for two years and counting. For at least the past eighteen months, Mr. Nguyen's detention has been unlawful.

2. ICE has perpetuated Mr. Nguyen's detention in violation of both the governing statute, 8 U.S.C. § 1231(a)(6), and the Due Process Clause. In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court held that 8 U.S.C. § 1231(a)(6) authorizes the detention of non-citizens with final orders of removal only for as long as their removal from the United States is reasonably foreseeable. "[O]nce removal is no longer reasonably foreseeable, continued

detention is no longer authorized." *Id.* at 699. Driving the *Zadvydas* Court's construction of the statute was its understanding that a "serious constitutional threat" would arise if the statute were instead interpreted to authorize indefinite detention of aliens like Mr. Nguyen who had been admitted to the United States and whose removal could not be effectuated. *Id.* at 690-94, 699.

3. In *Clark v. Martinez*, – U.S. –, 125 S. Ct. 716 (2005), the Supreme Court confirmed that 8 U.S.C. § 1231(a)(6) has the same meaning for all non-citizens who are its subject – be they deportable, inadmissible, or perceived to be a flight risk or danger. Indeed, the Court in *Clark* made clear that even the threat of terrorism is not a basis for continuing detention under 8 U.S.C. § 1231(a)(6) when removal is not reasonably foreseeable. *Id.* at 723 n.4.

4. In both *Zadvydas* and *Clark*, the Court indicated that six months is a presumptively reasonable period of time for the government to carry out a removal. *Zadvydas*, 533 U.S. at 701; *Clark*, 125 S. Ct. at 727. Yet Mr. Nguyen is now entering the third year of his post-final-order detention.

5. ICE concedes that Mr. Nguyen's removal from the United States is not reasonably foreseeable. Indeed, that much has been clear for at least the past eighteen months of Mr. Nguyen's confinement. ICE nonetheless refuses to release Mr. Nguyen.

6. To perpetuate its indefinite, potentially life-long detention of Mr. Nguyen, ICE has invoked 8 C.F.R. § 241.14(f), a regulation that purports to provide an exception to *Zadvydas*'s release requirement. With 8 C.F.R. § 241.14(f), the agency claimed for itself the authority to detain individuals when their removal is not reasonably foreseeable but they are deemed to be "specially dangerous" on account of mental illness.

7. Mr. Nguyen disputes the government's contention that he is "specially dangerous" and has been challenging this contention administratively for more than a year. In

the meantime, however, he endures continued detention under a regulation that lacks statutory authority.

8. Most recently, the Board of Immigration Appeals (BIA) determined that ICE had not met its burden under the regulation of proving that Mr. Nguyen is "specially dangerous" and it remanded his case for a new hearing before an immigration judge. However, the BIA's remand means only that Mr. Nguyen will experience further detention with no clear end to the administrative process in sight. Regardless of whether ICE ultimately convinces the BIA that Mr. Nguyen meets the regulation's definition of "specially dangerous," his continued detention under the regulation exceeds the government's statutory authority and violates the Due Process Clause of the Fifth Amendment. Mr. Nguyen should not have to wait any longer for an administrative determination of whether an *ultra vires* regulation does or does not apply to him.

9. Because his continued detention violates 8 U.S.C. § 1231 and the Due Process Clause, Mr. Nguyen respectfully requests that this Court grant the writ of habeas corpus and order his immediate release under reasonable, statutorily authorized conditions of supervision, as the Supreme Court's decisions in *Zadvydas* and *Clark* require.

JURISDICTION AND VENUE

10. This action arises under the Constitution and laws of the United States, including the Immigration and Nationality Act (INA), codified at 8 U.S.C. § 1001 *et seq.* This Court has habeas corpus jurisdiction pursuant to 28 U.S.C. § 2241 and Article I, Section 9 of the United States Constitution and federal question jurisdiction pursuant to 28 U.S.C. § 1331.

11. Venue is proper under 28 U.S.C. § 1391. Mr. Nguyen is currently detained in the U.S. Immigration and Customs Enforcement (ICE) contract facility operated by Global Expertise Outsourcing (GEO) Group, Inc. (hereinafter referred to as the "GEO detention facility") in

Aurora, Colorado, within the District of Colorado. In addition, one or more of the respondents are located within the District of Colorado.

PARTIES

12. Petitioner Candal Nguyen is a Vietnamese national. He was admitted to the United States on June 30, 1980, as a refugee and soon thereafter became a lawful permanent resident. Mr. Nguyen is presently confined in the GEO detention facility in Aurora, Colorado.

13. Respondent Alberto Gonzalez is sued in his official capacity as Attorney General of the United States. In this capacity, he has responsibility for the administration and enforcement of the immigration laws and is the legal custodian of Mr. Nguyen.

14. Respondent Michael Chertoff is sued in his official capacity as Secretary of the U.S. Department of Homeland Security (DHS). In this capacity, he has responsibility for the administration and enforcement of the immigration laws and is the legal custodian of Mr. Nguyen.

15. Respondent Michael Garcia is sued in his official capacity as the Assistant Secretary for Immigration and Customs Enforcement (ICE), a component of DHS. In his official capacity, Mr. Garcia is responsible for the administration and enforcement of the immigration laws, including the detention and removal of non-citizens subject to orders of removal, and is the legal custodian of Mr. Nguyen. ICE has contracted with the GEO Group, Inc. to house immigration detainees, including Mr. Nguyen, in the GEO detention facility in Aurora, Colorado.

16. Respondent Douglas Maurer is sued in his official capacity as Field Office Director of ICE's Office of Detention and Removal in Denver, Colorado. In this capacity, he is responsible for detaining and removing immigrants pursuant to the immigration laws in the

jurisdiction covered by the Denver ICE Field Office, which includes but is not limited to Aurora, Colorado. He is the local ICE official who has legal custody of Mr. Nguyen.

17. Respondent J. Alexander is sued in his official capacity as Warden of the GEO detention facility in Aurora, Colorado. In this capacity, he is the immediate physical custodian of Mr. Nguyen.

STATEMENT OF FACTS

18. Petitioner Candal Nguyen was born in Vietnam in 1961. In 1980, he was admitted to the United States as a refugee and soon thereafter adjusted his status to that of a lawful permanent resident.

19. On April 4, 2003, ICE commenced removal proceedings against Mr. Nguyen, based on a 1985 conviction for grand larceny under Mississippi law**.**

20. On April 7, 2003, ICE took Mr. Nguyen into custody and began its detention of him at the GEO detention facility in Aurora, Colorado. Mr. Nguyen has remained in immigration detention since that time, a period now exceeding twenty-seven months.

21. On July 16, 2003, after twenty-three years of living in this country, Mr. Nguyen was ordered removed from the United States on the basis of the eighteen-year-old grand larceny conviction. Mr. Nguyen waived his right to appeal the immigration judge's decision, rendering his removal order final on that same day. 8 C.F.R. § 1003.39.

22. To date, ICE has been unable to effectuate Mr. Nguyen's removal from the United States. In conducting a post-order custody review on October 20, 2003, ICE noted that the Vietnamese government had not responded to a July 25, 2003 request for travel documents for Mr. Nguyen. ICE has since conceded that Mr. Nguyen's removal is not reasonably foreseeable.

23. On February 6, 2004, after the presumptively reasonable six-month period for carrying out Mr. Nguyen's removal had lapsed, ICE had Mr. Nguyen undergo a Post-Order Custody Review Psychiatric Evaluation. The government psychiatrist who conducted the evaluation diagnosed Mr. Nguyen as having chronic undifferentiated schizophrenia.

24. Three months later, on May 13, 2004 – at least four months after Mr. Nguyen should already have been released from post-final-order detention under *Zadvydas v. Davis* – ICE issued a decision to continue Mr. Nguyen's detention. In its decision, served on Mr. Nguyen on May 28, 2004, ICE conceded that Mr. Nguyen's removal "does not appear significantly likely in the reasonably foreseeable future." Nonetheless, relying on the psychiatrist's evaluation and Mr. Nguyen's 2003 conviction under Colorado law for the misdemeanor offense of third degree assault, ICE continued Mr. Nguyen's detention under 8 C.F.R. § 241.14(f) based on the contention that he is "specially dangerous."

25. Under 8 C.F.R. § 241.14(f)(1), an alien is a "special danger" if he or she (i) has committed one or more crimes of violence, as defined by 18 U.S.C. § 16; (ii) is likely to engage in future acts of violence due to a mental condition or personality disorder; and (iii) no conditions of release can reasonably be expected to ensure the safety of the public.

26. Mr. Nguyen disputes ICE's contention that he satisfies any of these three criteria, including that he has committed a crime of violence. *Leocal v. Ashcroft*, 543 U.S. –, 125 S. Ct. 377 (2004).

27. ICE's May 13, 2004 detention decision was referred to an immigration judge for a determination of whether ICE could prove by clear and convincing evidence that Mr. Nguyen was a "special danger," as defined by 8 C.F.R. § 241.14(f)(1).

28. On August 2, 2004 – more than six months after Mr. Nguyen should have already been released under *Zadvydas v. Davis* – the immigration judge concluded a merits hearing in Mr. Nguyen's case. The immigration judge ruled that ICE had met its burden of proof and ordered further detention of Mr. Nguyen under the regulation.

29. By this time, Mr. Nguyen had been detained more than twice as long as the presumptive six-month time limit set forth in *Zadvydas* for persons with final removal orders.

30. Mr. Nguyen timely appealed the immigration judge's decision to the Board of Immigration Appeals (BIA). On June 16, 2005, more than ten months after the Immigration Judge had issued his order of detention, the BIA issued a decision remanding the case to the immigration judge.

31. The BIA found that ICE had failed to prove by clear and convincing evidence the elements required to justify Mr. Nguyen's continued detention under the regulation, namely that he was "likely to engage in acts of violence" and that "no conditions of release can reasonably be expected to ensure the safety of the public." In reaching this conclusion, the BIA noted that the psychiatrist who evaluated Mr. Nguyen, "did not find that [Mr. Nguyen], due to his mental illness, was 'likely to engage in acts of violence in the future' regardless of the conditions regarding his release." The BIA directed the parties and the immigration judge on remand to address the interpretation and application of the phrase "likely to engage in future acts of violence" and present additional evidence and argument as to whether Mr. Nguyen is "specially dangerous" under the regulation.

32. While detained, Mr. Nguyen has been housed with the general population. Although ICE claims authority to detain Mr. Nguyen on the alleged ground of harm-threatening mental illness, ICE keeps Mr. Nguyen in a standard detention facility and has made no effort to

place him in a facility that focuses on providing mental or rehabilitative health care. Notably, at the hearing before the immigration judge, the government's own psychiatrist testified that "if the only reason that [Mr. Nguyen is] incarcerated is because he has chronic mental illness . . . that would trouble me . . . he could benefit from some kind of psycho-social rehabilitation program . . . [b]ut if he's just incarcerated because what he needs is not available, then . . . obviously, that's troubling."

33. As of the filing of this Petition, Mr. Nguyen has been detained two years since his removal order became final. While the immigration judge has scheduled a hearing for July 25, 2005, to continue administrative proceedings in Mr. Nguyen's case, the interests of justice call for prompt judicial resolution of this matter. Beginning with ICE's already-dilatory May 13, 2004 order continuing Mr. Nguyen's detention, the administrative process has already run fourteen months, and the parties are back to square one, with no clear end in sight and Mr. Nguyen paying the price of prolonged detention.

34. Absent a ruling from this Court, Mr. Nguyen will continue to be detained indefinitely by Respondents and will suffer irreparable injury. Mr. Nguyen, therefore, properly seeks to challenge the legality of his detention through this petition for a writ of habeas corpus. *Soberanes v. Comfort*, 388 F.3d 1305, 1310 (10th Cir. 2004).

FIRST CLAIM FOR RELIEF

(In Excess of Statutory Authority)

35. Petitioner realleges and incorporates by reference each and every allegation in the preceding paragraphs as if set forth fully herein.

36. Respondents have been detaining Mr. Nguyen for two years since his order of removal became final, even though there is no dispute that Mr. Nguyen will not be removed in

the reasonably foreseeable future. Mr. Nguyen is being detained because Respondents have classified him as "specially dangerous" under 8 C.F.R. § 241.14(f).

37. Respondents lack the statutory authority under 8 U.S.C. § 1231(a)(6) to continue Mr. Nguyen's detention by labeling him "specially dangerous."

38. Furthermore, the "specially dangerous" regulation, 8 C.F.R. § 241.14(f), was promulgated without, and contrary to, statutory authority.

39. As a result, the regulation and Respondents' continued detention of Mr. Nguyen is *ultra vires*.

SECOND CLAIM FOR RELIEF

(Violates Due Process Clause of the Fifth Amendment)

40. Petitioner realleges and incorporates by reference each and every allegation in the preceding paragraphs as if set forth fully herein.

41. Respondents' continued detention of Mr. Nguyen pursuant to the "specially dangerous" regulation, 8 C.F.R. § 241.14(f), for a period of time far beyond what is required to effectuate his removal, violates his right to substantive and procedural due process under the Fifth Amendment of the U.S. Constitution.

REQUEST FOR RELIEF

WHEREFORE, Mr. Nguyen asks that this Court:

1. Issue a Writ of Habeas Corpus requiring Respondents to immediately release Mr. Nguyen from custody under reasonable, statutorily authorized conditions of supervision;

2. Declare that detention of Mr. Nguyen under 8 C.F.R. § 241.14(f) violates 8 U.S.C. § 1231 and the Due Process Clause;

3. Declare that the regulation, 8 C.F.R. § 241.14(f), under which immigrants like Mr. Nguyen are indefinitely detained on the ground that they are "specially dangerous," is *ultra vires* and in excess of Respondents' statutory authority;

4. Award costs, expenses, and attorneys' fees to Petitioner pursuant to 28 U.S.C. § 2412; and

5. Grant other relief as this Court deems just and proper.

Dated: July 15, 2005

Respectfully submitted,

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In cooperation with the ACLU Foundation of Colorado

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DOUGLAS MAURER, Field Office Director, Office of Detention and Removal, Immigration and Customs Enforcement, Department of Homeland Security, Denver, Colorado, and

J. ALEXANDER, Warden, Global Expertise Outsourcing Contract Detention Facility, Aurora, Colorado,

Respondents/Defendants.

VERIFICATION

I, Jennifer J. Lee, declare under the penalty of perjury:

1. I am a Staff Attorney at the American Civil Liberties Union Foundation of Colorado.

2. I verify that the foregoing Verified Petition for a Writ of Habeas Corpus and Complaint for Declaratory Relief is being filed on behalf of Candal Nguyen and that the allegations therein are true and correct to the best of my knowledge, information and belief.

This 15th day of July 2005, in Denver, Colorado.

s/ Jennifer J. Lee
Jennifer J. Lee