

**UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION**

MANUEL DURAN ORTEGA,

Petitioner,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY; KIRSTJEN NIELSEN, Secretary of Homeland Security; DAVID RIVERA, Director of the New Orleans Field Office of U.S. Immigration and Customs Enforcement; and DAVID COLE, Warden of the LaSalle Detention Facility,

Respondents.

CASE NO.

JUDGE:

MAGISTRATE JUDGE:

Date: April 13, 2018

PETITION FOR WRIT OF HABEAS CORPUS

INTRODUCTION

1. The actions pursued by government officials in this case threaten core First Amendment freedoms that are essential to our democracy: the right to criticize and expose the actions of government officials, and the right of members of the press to write and publish about them. Petitioner Manuel Duran Ortega is a 42-year-old journalist from El Salvador who fled to the United States in 2006 after his life was threatened. On April 3, 2018, while reporting on a demonstration in Memphis, Tennessee, Mr. Duran Ortega was illegally arrested by Memphis police and subsequently turned over to and detained by the Department of Homeland Security (DHS) in retaliation for his past critical

coverage of immigration enforcement activities. Mr. Duran Ortega was arrested and is being detained by DHS in order to punish and suppress his speech as a journalist, in violation of the First, Fourth, Fifth, and Fourteenth Amendments to the United States Constitution.

2. On April 3, 2018, Mr. Duran Ortega was arrested without probable cause by Memphis Police Department (“MPD”) officers while covering a protest related to MLK50, a city-sponsored event commemorating the 50th anniversary of Dr. Martin Luther King Jr.’s assassination. The demonstration specifically protested local law enforcement officials’ detention of immigrants for the purpose of turning them over to DHS custody. Although all charges against Mr. Duran Ortega were dropped on April 5, 2018, he was not allowed to leave jail. Instead, local officials turned him over to DHS officials at DHS’ behest. Since April 5, Mr. Duran Ortega has been detained at LaSalle Detention Center in Jena, Louisiana. He now faces removal to El Salvador, where investigative journalists like him regularly face threats and violent retaliation. His current detention is a direct result of his unlawful arrest and detention in violation of the First, Fourth, Fifth, and Fourteenth Amendments.

JURISDICTION AND VENUE

unconstitutional detention, have occurred and are occurring in the District. *See* 28 U.S.C. § 1391 and 28 U.S.C. § 2241. Divisional venue is proper in the Alexandria Division. *See* LR77.3.

5. No petition for habeas corpus has previously been filed in any court to review Petitioner’s case.

6. Nothing in federal immigration law strips this Court of its jurisdiction over Petitioner’s claims. *See* 8 U.S.C. § 1252 (specifying provisions governing judicial review of orders of removal). Petitioner is currently challenging his removal order through separate proceedings in immigration court. Here, Petitioner challenges his current detention, which violates the First, Fourth, Fifth, and Fourteenth Amendments to the Constitution.

PARTIES

7. Petitioner Manuel Duran Ortega is a citizen of El Salvador who has lived continuously in the United States since 2006. Mr. Duran Ortega has been in the custody of Respondents since April 5, 2018.

8. The U.S. Department of Homeland Security (“DHS”) is a cabinet department of the United States federal government with the primary mission of securing the United States. Immigrations and Customs Enforcement (ICE) is a component agency

10. Respondent David Rivera is the Director of the New Orleans Field Office of ICE, which has immediate custody of Petitioner. He is sued in his official capacity.

11. Respondent David Cole is the warden of the LaSalle Detention Center. He is sued in his official capacity.

STATEMENT OF FACTS

A. Mr. Duran Ortega is a journalist who has engaged in political speech critical of federal and local law enforcement.

12. Manuel Duran Ortega is a citizen of El Salvador who has lived in the United States continuously since his arrival in 2006. He has resided in Memphis, Tennessee, for the majority of that time. *See* Ex. 1 ¶ 5 (Duran Ortega Decl.)

13. In 2006, Mr. Duran Ortega fled El Salvador, where he had been working as a television station manager. *Id.* ¶ 3. After a rival television station employee used his law enforcement connections to have Mr. Duran Ortega arrested on trumped-up charges, Mr. Duran Ortega reported on corruption in law enforcement and the judicial system.. *Id.* After his report, he began to receive death threats and escaped to the United States. *Id.*

14. In Memphis, Mr. Duran Ortega is a well-known member of the local press. *See Id.* ¶ 8 (Duran Ortega Decl.); Ex. 2 (Valdez Decl.) ¶ 6; Ex. 3 (Escobar Decl.) ¶ 4; Ex. 4 (Flores Decl.) ¶ 3; Ex. 5 (Morales Decl.) ¶ 6. In 2007, Mr. Duran Ortega began working with a Spanish-language radio program called *La Voz*. *See* Ex. 1 (Duran Ortega Decl.) ¶5. In 2008, he left *La Voz* and began working as a hos98 0 Tt13.0415 0 TD.0005 Tc.173]TJ17.elu

id.

17. In addition to these storie

B. Mr. Duran Ortega was engaged in activiti

26. Some members of the press were physically guided to the sidewalk. *See*
Facebook Live Video,
<https://www.facebook.com/memphisnoticias/videos/1807922945897801/UzpfSTUxMjIzMDMzNTQ2NzA3NToxODA3OTg1NDM1ODkxNTUy/>

see

also

<https://www.facebook.com/memphisnoticias/videos/1807922945897801/UzpfSTUxMjIzMzMzNTQ2NzA3NToxODA3OTg1NDM1ODkxNTUy/> at 15:04-15:30.

30. People who had been participating in the demonstration, knowing Mr. Duran Ortega to be a member of the press, grabbed him to attempt to prevent his arrest.

consistent with all police directives. *See* Ex. 1 (Duran Ortega Decl.) ¶ 17; Ex. 7 (Vega Decl.) ¶ 6; Ex. 8 (Kaaz Decl.) ¶ 6.

32. Mr. Duran Ortega was processed at the Shelby County jail alongside three other men who were arrested. Ex. 8 (Kaaz Decl.) ¶ 9. Because he does not speak English well, they helped him look at his paperwork. *Id.*

33. A bond was set for Mr. Duran Ortega on the evening of April 3, 2018 in the amount of \$100. Ex. 1 (Duran Ortega Decl.) ¶ 18; Ex. 2 (Valdez Decl.) ¶ 10; *see also* Ex. 6 (Swatzell Decl.) ¶ 6; Ex. 33 (bond receipt). Melisa Valdez, his domestic partner, paid the \$100 bond at around 9:00pm on April 3, 2018. Ex. 2 (Valdez Decl.) ¶ 10; Ex. 33; *see also* Ex. 6 (Swatzell Decl.) ¶ 7. Despite this, Mr. Duran Ortega was not released. Ex. 1 (Duran Ortega Decl.) ¶ 18; Ex. 2 (Valdez Decl.) ¶ 10; Ex. 6 (Swatzell Decl.) ¶ 7; Ex. 8 (Kaaz Decl.) ¶ 10. A clerk brought him documents in Spanish stating that DHS wanted to verify information about him. Ex. 1 (Duran Ortega Decl.) ¶ 18; Ex. 2 (Valdez Decl.) ¶ 10. The clerk also brought him paperwork in English that he did not understand and refused to sign. Ex. 1 (Duran Ortega Decl.) ¶ 18. Spencer Kaaz, who saw the paper, remembers that it was an ICE detainer. Ex. 8 (Kaaz Decl.) ¶ 9.

34. Later that evening, the other men arrested at the protest were released on bond. Ex. 8 (Kaaz Decl.) ¶ 10. Mr. Duran Ortega was separated from them. *Id.* One of the men attempted to ask an officer why he was being separated when his bond had also been

(Duran Ortega Decl.) ¶ 20; Ex. 2 (Valdez Decl.) ¶ 14; Ex. 6 (Swatzell Decl.) ¶ 10. Two officers led him to a waiting vehicle where they fingerprinted him and attempted to make him sign documents in English that he did not understand. Ex. 1 (Duran Ortega Decl.) ¶ 20.

39. Ordinarily, detainees at Shelby County jail are transferred into DHS custody through processing first at a facility in Memphis and then spend several days at a small short-term detention center in Mason, Tennessee, before transfer to a longer-term ICE detention facility such as LaSalle Detention Center. *See* Ex. 4 (Flores Decl.) ¶ 12; Ex. 6 (Swatzell Decl.) ¶ 11; Daniel Connolly, *Immigration agents make arrests in Memphis – one family’s story*, Commercial Appeal (June 9, 2017) <https://www.commercialappeal.com/story/news/2017/06/09/immigration-agents-make->

immigrants in Memphis to a holding center on Summer Ave., to Mason, TN, and then to LaSalle).

40. In contrast with this routine process for Tennessee detainees, Mr. m0 gt(0)c41.6 g70.

41. Mr. Duran Ortega remains in detention, where is he is subject to removal pursuant to an *in absentia* order of removal entered at a January 2007 immigration court hearing in Atlanta. Mr. Duran Ortega did not receive communication from DHS or the Immigration Court providing him notice of the 2007 Atlanta hearing. Ex. 1 (Duran Ortega Decl.) ¶ 4. On April 9, 2018, Mr. Duran Ortega filed a motion to reopen with the Atlanta Immigration Court. In his Motion to Reopen, Mr. Duran Ortega argues that: (1) material changes in conditions in El Salvador lead him to fear that, if returned, he will be persecuted both as a journalist and as an individual who has a political opinion rooted in pro-accountability and anti-corruption; (2) he was not notified of the hearing as required by statute and regulation and extraordinary circumstances prevented his presence at the hearing; and (3) humanitarian and constitutional considerations require re-opening his immigration case.

42. Mr. Duran Ortega's removal has been temporarily halted in conjunction with the filing of the Motion to Reopen, but he remains unlawfully detained by DHS pursuant to and as a direct result of, his unlawful arrest and detention.

CAUSES OF ACTION

COUNT ONE FIRST AMENDMENT – RETALIATION

43. Petitioner repeats and incorporates by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

44. The First Amendment to the United States Constitution prohibits government action that restricts freedom of speech. “The First Amendment prohibits not only direct limits on individual speech but also adverse governmental action taken against an individual in retaliation for the exercise of protected speech activities.” *Keenan v. Tejada*, 290 F.3d 252, 258 (5th Cir. 2002).

45. Speech that addresses matters of government policy, including criticism of law enforcement practices, is entitled to vigorous First Amendment protection. Indeed, “[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.” *City of Houston, Tex. v. Hill*, 482 U.S. 451, 462–63 (1987). Furthermore, critical speech is rooted in our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *New York Times Co. v. Sullivan*, 376 U.S. 354, 270 (1964).

46. Moreover, all persons in the United States, including non-citizens, enjoy the “right to peaceful expression of views through public demonstration.” *Parcham v. I.N.S.*, 769 F.2d 1001, 1004 (4th Cir. 1985); *see also Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1064 (9th Cir. 1995) (“It is thus especially appropriate that the First Amendment principle of tolerance for different voices restrain our decisions to expel a participant in that community from our midst.”).

47. The First Amendment precludes law enforcement officials from retaliating by targeting, detaining, arresting, and/or seeking to deport an individual engaging in protected speech where the officials’ actions “caused [the speaker] to suffer an injury that

would chill a person of ordinary firmness from continuing to engage in that activity” and were “substantially motivated against the plaintiffs’ exercise of constitutionally protected conduct.” *Keenan*, 290 F.3d at 258.

48. When law enforcement officers’ decisions to target, arrest, detain, or deport a non-citizen are substantially motivated by that individual’s protected speech, those decisions violate the First Amendment.

49. Mr. Duran Ortega’s speech, through his publications in *Memphis Noticias* and on social media outlets is core protected speech under the First Amendment. His articles and commentary have exposed the entanglement of local law enforcement and federal immigration enforcement and its impact on community members. His reporting on DHS, ICE, and local law enforcement activities have frequently been critical of law enforcement. His speech about immigration enforcement policy pertains to matters of public concern and seeks to educate and inform the Latino communities of Memphis about matters of political concern. It is therefore entitled to the highest level of protection under the First Amendment.

50. The arrest, detention, and imminent deportation that Mr. Duran Ortega currently faces have injured him and continue to injure him, and would chill any person of ordinary firmness from continuing to speak out on issues related to immigration enforcement and policy.

51. Respondents’ detention of Mr. Duran Ortega is a direct result of Memphis law enforcement officers’ and ICE officers’ illegal and unconstitutional actions in targeting, arresting, detaining, and seeking to deport Mr. Duran Ortega. MPD unlawfully

arrested Mr. Duran Ortega to silence and retaliate against him. Once Mr. Duran Ortega was jailed SCSO officials prevented him from exercising his right to bond and otherwise acted to prolong his already unlawful confinement in jail.

52. SCSO officials further retaliated against Mr. Duran Ortega by voluntarily turning him over to ICE officers. ICE officials then swiftly acted—in contrast with their normal processing of Memphis detainees—to remove Mr. Duran Ortega from Tennessee, where his attorneys and a large community of supporters were located.

53. Respondents' detention of Mr. Duran Ortega reflects a growing pattern of efforts by ICE officials to silence and suppress the controversial speech of certain immigrants by arresting, detaining, and attempting to summarily remove them. *See, e.g., Ragbir v. Sessions*, No. 18-CV-236 (KBF), 2018 WL 623557, at *1 n.1 (S.D.N.Y. Jan. 29, 2018) (“The Court also notes with grave concern the argument that petitioner has been targeted as a result of his speech and political advocacy on behalf of immigrants’ rights and social justice.”); *Vargas v. United States Dep’t of Homeland Sec.*, No. 1:17-CV-00356, 2017 WL 962420, at *3 (W.D. La. Mar. 10, 2017) (habeas petitioner alleged that ICE arrested, detained, and sought to remove her to retaliate against her for statements to the media); *see also* John Burnett, “Immigration Advocates Warn ICE is Retaliating for Activism,” *National Public Radio* (March 16, 2018). <https://www.npr.org/2018/03/16/593884181/immigration-advocates-warn-ice-is-retaliating-for-activism> .

54. The illegal detention of Mr. Duran Ortega suppresses his constitutionally-protected conduct; namely, Mr. Duran Ortega's reporting on how conduct by local law enforcement and ICE has adversely impacted immigrant communities in Memphis.

55. Respondents' ongoing detention of Mr. Duran Ortega violates the First Amendment to the United States Constitution.

COUNT TWO
FIRST AMENDMENT – SUPPRESSION OF FREEDOM OF THE PRESS

56. Petitioner repeats and incorporates by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

57. The First Amendment to the United States Constitution enshrines broad protections for freedom of the press. It protects the freedom of the press to speak and report, and also to gather news. *In re Express-News Corp.*, 695 F.2d 807, 808 (5th Cir. 1982) (“news-gathering is entitled to first amendment protection, for without some protection for seeking out the news, freedom of the press could be eviscerated”) (internal citations omitted). “Where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order.” *The Florida Star v. B.J.F.*, 491 U.S. 524, 542 (1989); *see also Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 103 (1979) (subjecting to heightened scrutiny criminal punishment for publication of information lawfully obtained through news-gathering).

58. “At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence . . . Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right.” *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994). The press must have broad discretion to print particular view points, and “[g]overnmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers.” *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

59. Through *Memphis Noticias*, Mr. Duran Ortega has published in writing or posted to social media numerous reports that criticize or give voice to others criticizing law enforcement, particularly with respect to immigration enforcement activities by federal and local officials and local law enforcement’s entanglement with ICE. Memphis law enforcement officials attempted to make him change the content of his reporting, going so far as to ask him to remove a story about MPD’s collaboration with ICE. By repeatedly excluding *Memphis Noticias* from its press conferences on issues of importance to Mr. Duran Ortega’s readers, MPD continued its attempts to influence his reporting. On the day MPD arrested Mr. Duran Ortega, he was covering a protest that specifically targeted collaboration between local law enforcement and immigration authorities.

60. Mr. Duran Ortega’s arrest on April 3, his detention by local officials, his subsequent transfer to DHS custody and immediate transportation by DHS to a remote

detention center, and DHS' ongoing detention of Mr. Duran Ortega result directly from local and federal law enforcement officials' efforts to target, punish, and silence his voice as a journalist.

61. Mr. Duran Ortega's continued detention constitutes unlawfully targeted punishment and retaliation for his protected activities as a member of the press.

COUNT THREE
FOURTH AMENDMENT – UNLAWFUL ARREST AND DETENTION¹

62. Petitioner repeats and incorporates by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

63. As set forth above, Mr. Duran Ortega was arrested without a prior warrant or probable cause by Memphis Police Department (MPD) officers while he was reporting on a protest at the Shelby County Justice Center. Mr. Duran Ortega was attempting to comply with police orders to clear the street by moving from a crosswalk area to the sidewalk but was grabbed by MPD officers and not given a chance to do so. One

¹ The Supreme Court recently held that a plaintiff who alleged unlawful arrest stated a Fourth Amendment claim “when he sought relief not merely for his (pre-legal-process) arrest, but also for his (post-legal-process) pretrial detention.” *Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911, 919 (2017); *see also Brooks v. George Cty., Miss.*, 84 F.3d 157, 166 (5th Cir. 1996) (“[O]nce the incidents of a

protestor explicitly told MPD officers that Mr. Duran Ortega was following their instructions. Mr. Duran Ortega did not resist arrest. Protestors alerted MPD officers to the fact Mr. Duran Ortega was a journalist, and he was clearly identified as a journalist. These circumstances clearly showed Mr. Duran Ortega was neither engaged in disorderly conduct nor obstructing the road. *See* Tenn. Code Ann. § 39-17-305 (defining disorderly conduct as requiring, *inter alia*, “intent to cause annoyance or alarm”); Tenn. Code Ann. § 39-17-307 (requiring, *inter alia*, that an individual “intentionally, knowingly or recklessly” obstruct a road). Despite these facts, Mr. Duran Ortega was hastily arrested and charged with misdemeanor disorderly conduct and obstruction of a road.

64. Mr. Duran Ortega was then unlawfully detained at the Shelby County Jail for two days. Mr. Duran Ortega’s warrantless arrest and resultant unlawful detention by Memphis law enforcement officers violated the Fourth Amendment to the United States

223 (1960) (evidence obtained from state officers during a search that violates the Fourth Amendment may not be introduced in federal proceedings).

COUNT FOUR
UNLAWFUL DETENTION IN VIOLATION OF THE FOURTEENTH
AMENDMENT

66. Petitioner repeats and incorporates by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

67. The due process clause of the Fourteenth Amendment protects pre-trial detainees from being detained in excess of their lawful period of detention. *Brooks v. George Cty., Miss.*, 84 F.3d 157, 166 (5th Cir. 1996).

68. As set forth above, the MPD had no lawful basis on which to arrest or detain Mr. Duran Ortega. Because MPD unlawfully arrested Mr. Duran Ortega, his confinement in the Shelby County jail for two days pursuant to MPD's unlawful arrest deprived him of his liberty without due process of law.

69. Even after Mr. Duran Ortega's domestic partner posted bond for him on April 3, 2018, SCSO jail authorities continued to detain Mr. Duran Ortega. SCSO authorities intentionally failed to present the bond papers to Mr. Duran Ortega for his signature, thereby restraining him from leaving jail when bond was posted for him. *See Dodds v. Richardson*, 614 F.3d 1185, 1193 (10th Cir. 2010) (arrestees who have bail "have a protected liberty interest in posting bail and being freed from detention"); *Campbell v. Johnson*, 586 F.3d 835, 840–41 (11th Cir. 2009) (plaintiff stated due process claim against sheriff who allegedly directed that plaintiff's bond would not be accepted).

70.

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays that this Court grant the following relief:

(1) Issue a Writ of Habeas Corpus requiring Respondents to release Petitioner immediately;

(2) Enter a judgment declaring that Respondents' detention of Petitioner is in violation of his First, Fourth, Fifth and Fourteenth Amendment rights;

(37(c)4.002 Tcs654 -2.2949 TD-.0005 Tc72.2995 TD [(quiringhe91o63entii87)pi876 6938324n r