

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION**

FRANCISCO ROMAN MORALES
TORRES ([REDACTED])
Petitioner,

v.

DALE J. SCHMIDT, in his official capacity
as Dodge County Sheriff;

ROBERT GUADIAN, in his official capacity
as Field Office Director, Chicago Field
Office, U.S. Immigration and Customs
Enforcement;

MATTHEW T. ALBENCE, in his official
capacity as Deputy Director and Senior
Official Performing the Duties of Director of
U.S. Immigration and Customs Enforcement;

CHAD WOLF, in his official capacity as
Acting Secretary of the U.S. Department of
Homeland Security;

Respondents.

**EMERGENCY PETITION FOR WRIT
OF HABEAS CORPUS PURSUANT TO
28 U.S.C. § 2241 AND COMPLAINT FOR
INJUNCTIVE RELIEF**

EMERGENCY PETITION FOR A WRIT OF HABEAS CORPUS

1. Petitioner Francisco Morales Torres is a gay man from Mexico who has twice been granted protection by an immigration judge but has been detained by Immigration & Customs Enforcement (ICE) for more than 18 months, while the government has appealed twice. Mr. Morales Torres previously petitioned for a writ of habeas corpus in June 2019, and that petition was denied without prejudice on the basis that his detention had not yet “become unreasonable, unjustified, or arbitrary in violation of the Due Process Clause.” *See Ex. A, Morales Torres v. Schmidt et al.*, No. 2:19-cv-00929-WCG (E.D. Wisc. Aug. 6, 2019). These

factors now weigh in favor of release, because of Mr. Morales Torres’s prolonged detention, his repeat grants of protection by an immigration judge, and in the face of the Dodge County Detention Center’s failure to protect him from COVID-19.

2. Indeed, it is well known that COVID-19 has led to a global pandemic for which there is no vaccine or cure. This public health crisis has led to a national-emergency declaration and stay-at-home orders. Yet, ICE continues to detain noncitizens despite the growing danger of infection and 100 confirmed cases in its custody as of April 16, 2020.¹ Experts predict mass contagion within jails is inevitable.² These factors, especially when considered on top of Mr. Morales Torres 18 months of prolonged detention with no end in sight, favor his release.

THE PARTIES

3. Mr. Morales Torres is a Mexican national. He has been living in the United States since around 2007. In September 2018, DHS arrested him in Illinois and detained him in Dodge County Detention Facility in Juneau, Wisconsin. He has been in DHS custody since then.

4. Respondent Dale J. Schmidt is sued in his official capacity as the Sheriff of Dodge County, where Mr. Morales Torres is detained. He is the immediate custodian of Mr. Morales Torres.

5. Robert Guadian is sued in his official capacity as the Field Office Director of the Chicago Field Office of U.S. Immigration and Customs Enforcement (ICE), which has administrative jurisdiction over Mr. Morales Torres’s detention. He is a legal custodian of Mr. Morales Torres with authority to authorize his release.

¹ ICE Guidance on COVID-19: Confirmed Cases, <https://www.ice.gov/coronavirus>.

² See, e.g., Rich Shapiro, *Coronavirus Could “Wreak Havoc” on U.S. Jails, Experts Warn*, NBC News (Mar. 12, 2020), <https://tinyurl.com/y8vb8hhy> (“An outbreak . . . inside the walls of a U.S. prison or jail is now a question of when, not if.”); Dr. Anne C. Spaulding, MD MPH, *Coronavirus COVID-19 and the Correctional Facility: For the Correctional Healthcare Worker*, 17 (Mar. 9, 2020), <https://tinyurl.com/ya9cseos>; *167 Cook County Jail Detained noncitizens Have Tested Positive for COVID-19, Officials Say*, NBC Chicago (Apr. 1, 2020), <https://tinyurl.com/yaswfo4c>.

6. Respondent Matthew T. Albence is sued in his official capacity as the Acting Director of ICE, the agency that is responsible for detaining noncitizens in removal proceedings and oversees Mr. Morales Torres's detention at Dodge County Detention Facility. He is a legal custodian of Mr. Morales Torres with authority to authorize his release.

7. Respondent Chad Wolf is sued in his official capacity as the Acting Secretary of DHS. Respondent Wolf is responsible for administering federal immigration laws. He is a legal custodian of Mr. Morales Torres with authority to authorize his release.

JURISDICTION AND VENUE

8. This Court has jurisdiction under Art. I, § 9, cl. 2 of the United States Constitution (the Suspension Clause); 28 U.S.C. § 2241 (the general grant of habeas authority); 28 U.S.C. § 1331 (federal question jurisdiction); and 28 U.S.C. §§ 2201, 2202 (Declaratory Judgment Act).

9. District courts have jurisdiction under 28 U.S.C. § 2241 to hear habeas claims by noncitizens challenging the lawfulness or constitutionality of their immigration detention. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 839-42 (2018); *Demore v. Kim*, 538 U.S. 510, 516-17 (2003); *Zadvydas v. Davis*, 533 U.S. 678, 687 (2001).

10. This Court has jurisdiction to grant declaratory and injunctive relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201, *et seq.*; the All Writs Act, 28 U.S.C. § 1651; 28 U.S.C. § 2241(a); and FED. R. CIV. P. 57 and 65.

11. Venue is proper under 28 U.S.C. § 1391(e) because Mr. Morales Torres is detained at the Dodge County Detention Center in Juneau, Wisconsin, within the jurisdiction of this Court. *See* 28 U.S.C. § 2241(d). Venue is also proper because Respondent Schmidt resides in the district.

STATEMENT OF THE CASE

A. Mr. Morales Torres's Procedural Background

1. Mr. Morales Torres, a 26-year-old gay man from Mexico with multiple chronic health conditions, has lived in the United States since he was about 13 years old. Ex. B, Morales Torres Decl. ¶ 2. From 2012 to November 2017, Mr. Morales Torres was twice granted Deferred Action for Childhood Arrivals (DACA). Ex. A, p. 2.

2. The Department of Homeland Security (DHS) detained Mr. Morales Torres and placed him in removal proceedings in September 2018. He has been detained at Dodge County Detention Center since that time. Ex. B, ¶ 4.

3. An immigration judge granted Mr. Morales Torres asylum on April 22, 2019, based on his well-founded fear of persecution in Mexico stemming from both his sexual orientation and his mental health. Ex. C, Immigration Judge 2019 Decision. DHS appealed that grant of asylum, and on October 4, 2019 the Board of Immigration Appeals (BIA) sustained DHS's appeal and remanded the case to the Immigration Judge for consideration of additional protection, under the Convention Against Torture (CAT). Ex. D, BIA Decision. Mr. Morales Torres appealed the denial of asylum by the BIA to the Seventh Circuit, but briefing in that case will not commence until the CAT claim is resolved. *See Morales Torres v. Barr*, No. 19-3189 (7th Cir.).

4. On February 10, 2020, the judge again granted protection, this time under the CAT. Ex. E, Immigration Judge 2020 Decision. DHS has again appealed. Ex. B, ¶ 4. That appeal remains pending before the BIA and has not yet been set for a briefing schedule. *Id.*

5. Throughout these proceedings, DHS has been detained at Dodge County Detention Facility in Juneau, Wisconsin. He has requested and been denied release on numerous occasions. In addition to his prior *habeas* petition mentioned above, an immigration judge found him

ineligible for bond under 8 U.S.C. § 1226(c), relying on his conviction for possession of a stolen vehicle under Illinois law, 625 ILCS 5/4-103(a)(1). ICE has likewise denied multiple release requests. *See* Ex. F, 2019 Release Request and Denial; Ex. G, 2020 Release Request and Denial.

B. Mr. Morales Torres’s Personal Background

6. Mr. Morales Torres has numerous health conditions. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

7. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

8. Both Mr. Morales Torres’s mental health and his sexual orientation contributed to the immigration judge’s two separate decisions to grant him protection. With respect to his mental health, the judge recognized his “lengthy history of mental illness, spanning his entire life” and noted that many of his “symptoms are present even with medication.” Ex. E, p 5. The judge also recognized Mr. Morales Torres’ sexual orientation and effeminate nature, and found that those factors along with Mr. Morales Torres’s acute mental health conditions placed him at risk of

persecution and torture in Mexico and that the probability of such harm was sufficient to warrant a grant of protection. Ex. C, pp. 5-6; Ex. E, pp. 2-3.

9. In the time since he was placed in removal proceedings, Mr. Morales Torres has, for the first time, received a thorough and accurate psychiatric evaluation. Ex. B, ¶ 3. As a result, he finally understands the treatment he needs to pursue and has a plan to pursue it. *Id.* Specifically, he plans to pursue individual and group therapy, and continue on the medication regimen that has helped to control his mental health conditions. *Id.* ¶ 5.

10. Mr. Morales Torres is prepared to self-isolate if released from custody. His lifelong friend, Jennifer Rumin, has agreed to house him and help him with the process of appropriate social isolation. Ex. B, ¶ 34; *see also* Ex. G, Letter of Support from Jennifer Rumin.

11. Mr. Morales Torres's immigration case is awaiting a briefing schedule at the BIA, which he expects to be delayed due to the COVID-19 pandemic. Under the best of circumstances, awaiting the resolution of his appeal will bring Mr. Morales Torres's total detention time in ICE custody to well over two years.

C. Circumstances of Confinement at Dodge County Detention Center

12. Mr. Morales Torres has been detained at Dodge for more than 18 months. While the circumstances of confinement have always been difficult, they are now acute because he lives with persistent fear of COVID-19. Ex. B, ¶¶ 6, 21, 29, 30.

13. The facility has provided very little information about COVID-19 risks or how to stay safe. About a month ago, guards hung a CDC sign telling detained individuals to "Stay at Home" and "Practice Social Distancing" but that information is of limited utility to a detained population that cannot comply with those guidelines while living in a housing unit with around 55 other people. Ex. B, ¶ 7. Although these individuals have their own cells, they must leave

their cells at multiple points during the day; they congregate to eat, shower, exercise, exchange laundry, speak to officials, use the phone, and collect medication. *Id.* ¶¶ 8, 9, 12, 14.

14. Cleaning in the unit is largely left to the detained individuals themselves. Ex. B, ¶ 13. They are responsible for wiping down the tables where they eat and cleaning the showers, for example. But they are given dirty rags and few cleaning products. Mr. Morales Torres reports that he has never seen anyone clean the handrails or walls. *Id.* ¶¶ 8, 10, 13.

15. Protective gear is also not available. Ex. B, ¶ 13. Indeed Mr. Morales Torres reports, “The guards have not changed anything since the COVID-19 outbreak began,” and though individuals had their temperature taken about a month ago and were warned to report symptoms, there has been no follow-up to that instruction. *Id.* ¶¶ 14, 15.

16. Because of these congregate conditions of confinement and his impression that the jail is not prepared, Mr. Morales Torres reports, “I don’t feel safe here.” Ex. B, ¶ 18.

D. COVID-19 and Its Risks in Detention Settings

17. On March 11, 2020, the World Health Organization declared a world pandemic due to the spread of COVID-19.³ The CDC reports 632,220 confirmed cases and 31,071 deaths across the United States as of April 16, 2020.⁴ The number is quickly rising. In Wisconsin, 3,875 individuals have tested positive for the virus as of April 16, 2020.⁵

18. Immigration detention facilities are “congregate environments,” or places where people live and sleep in close proximity, where infectious diseases are more likely to spread.

³ *WHO Director-General’s opening remarks at the media briefing on COVID-19*, World Health Org. (Mar. 11, 2020), <https://tinyurl.com/vyvm6ob>.

⁴ *Cases in U.S. – COVID-19: U.S. at a Glance*, CDC (Apr. 6, 2020), <https://tinyurl.com/qqt3aq6>.

⁵ *Cumulative total and newly reported COVID-19 cases by date confirmed*, Wisconsin Department of Health Services (Apr. 16, 2020), <https://www.dhs.wisconsin.gov/covid-19/index.htm>.

There are “unique challenges in stopping the spread of the disease and protecting the health of individuals” in detention settings.⁶

19. The risk is exacerbated by the size of the detained population, the proportion of vulnerable people detained, and a scarcity of medical resources. Ex. H, Dec. of Dr. Brie Williams. People in facilities live in close quarters and cannot achieve the social distancing needed to effectively prevent the spread of COVID-19. *Id.* ¶ 7. At Dodge, Mr. Morales Torres shares showers, eating spaces, phones, and exercise equipment with more than 50 people, without regular disinfection. Ex. B, ¶¶ 7-13; *see also* Ex. H. ¶ 7.

20. Jails and prisons are seeing outbreaks of COVID-19 grow at alarming rates. As of April 7, 2020, 406 staff members and 287 inmates assigned to New York City jails had tested positive for the virus, and six correctional officers have died in the last three weeks.⁷ On April 2, 2020, a 58-year old inmate became the first to die in the New York state prison system, and he had no apparent pre-existing conditions.⁸

21. On March 22, 2020, a correctional officer at the Cook County Jail tested positive for COVID-19.⁹ Two inmates also tested positive.¹⁰ As of April 2, 2020, less than two weeks later, 167 detained individuals and 34 employees had tested positive, showing the rapidity of spread in

⁶ *Basank v. Decker*, 2020 WL 1481503, at **8-9 (S.D.N.Y. Mar. 26, 2020) (noting that “[a] number of courts in this district and elsewhere have recognized the threat that COVID-19 poses to individuals held in jails and other detention facilities”); *see, e.g.*, Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 *Clinical Infectious Diseases* 1047, 1047 (Oct. 2007), <https://tinyurl.com/tgtand6> (noting that in jails “[t]he probability of transmission of potentially pathogenic organisms is increased by crowding, delays in medical evaluation and treatment, rationed access to soap, water, and clean laundry, [and] insufficient infection-control expertise”); *see also* Claudia Lauer & Colleen Long, *US prisons, jails on alert for spread of coronavirus*, Associated Press (Mar. 6, 2020), <https://tinyurl.com/row3olr>.

⁷ Chelsea Rose Marcius, *Coronavirus claims the lives of at least 6 NYC correction officers, 1 captain*, *N.Y. Daily News* (Apr. 7, 2020), <https://tinyurl.com/yc8co4q7>.

⁸ *NYC Death Toll Tops 1,500 as Cuomo Warns on Ventilators*, *N.Y. Times* (Apr. 2, 2020), <https://tinyurl.com/rocqw5w>.

⁹ *Cook County Jail Reports Additional Positive Coronavirus Tests*, NBC Chicago (Mar. 24, 2020), <https://tinyurl.com/y88l6297>.

¹⁰ Barbara Vitello, *Two Cook County jail inmates positive for COVID-19*, *Daily Herald* (Mar. 23, 2020), <https://tinyurl.com/y8dyh7kr>.

a congregate setting, and an infection rate that was 50 time higher than the rest of Illinois.¹¹ As of April 14, 2020, more than 350 cases have been connected to the facility.¹²

22. Immigration detention facilities face the same problem. An officer at a northern New Jersey facility used by ICE to detain immigrants tested positive for the virus, and soon after a medical officer and detained immigrant also tested positive.¹³

23. As of April 16, 2020, ICE reported 100 confirmed COVID-19 cases among detained noncitizens and 25 cases among ICE employees working in ICE detention facilities; here were just 32 confirmed cases of detained noncitizens a week earlier.¹⁴

24. As of April 14, 2020, there were four confirmed positive cases of COVID-19 at the Pulaski County Detention Center,¹⁵ which like the Dodge County Detention Center, is part of the ICE's Chicago Area of Responsibility. Pulaski, Dodge and all other facilities in the region receive frequent transfers from the other facilities and from prisons and jails.

E. Spread and Health Risks of COVID-19

25. Infected individuals likely are capable of spreading COVID-19 up to 48 hours before they show symptoms, and many individuals remain asymptomatic.¹⁶ As CDC Director Dr. Robert Redfield explained, "That's important, because now you have individuals that may not have any symptoms that can contribute to transmission."¹⁷

¹¹ *167 Cook County Jail Detained noncitizens Have Tested Positive for COVID-19, Officials Say*, NBC Chi. (Apr. 1, 2020), <https://tinyurl.com/yaswfo4c>.

¹² *Report: Cluster of COVID-19 Cases at Cook County Jail the Largest in the Nation*, NBC Chi. (Apr. 1, 2020), <https://tinyurl.com/y7zn38hh>.

¹³ See Rodrigo Torrejon, *Corrections officer at NJ jail tests positive for COVID-19*, CorrectionsOne (Mar. 20, 2020), <https://tinyurl.com/ycjke33m>; Craig McCarthy & Kenneth Garger, *ICE medical staffer at NJ detention center tests positive for coronavirus*, N.Y. Post (Mar. 20, 2020), <https://tinyurl.com/ya5gnbq2>; Priscilla Alvarez & Catherine E. Shoichet, *First ICE detainee tests positive for coronavirus*, CNN (Mar. 24, 2020), <https://tinyurl.com/sage51w>.

¹⁴ *ICE Guidance on COVID-19: Confirmed Cases*, <https://www.ice.gov/coronavirus>.

¹⁵ Molly Parker, *3 detainees, 1 correctional officer of Pulaski County Detention Center diagnosed with COVID-19*, S. Illinoisan (Apr 9, 2020) <https://tinyurl.com/y8w4dy2y>.

¹⁶ Sam Whitehead, *CDC Director On Models For The Months To Come: 'This Virus Is Going To Be With Us'*, NPR (Mar. 31, 2020), <https://tinyurl.com/tlex8sq>.

¹⁷ *Id.*

26. Individuals may also transmit the virus up to eight days after their symptoms resolve.¹⁸ According to the CDC, the virus spreads most frequently between people who are in close contact with one another, through respiratory droplets associated with coughing, sneezing, and talking, and through contact with contaminated surfaces.¹⁹ The median incubation period is five days,²⁰ and serious complications can manifest not long after the onset of symptoms, with some patients descending suddenly and rapidly into respiratory distress. Ex. H. ¶ 17.

27. Certain underlying medical conditions, increase the risk of serious COVID-19. Ex. H ¶ 9.²¹ As is relevant to Mr. Morales Torres, “Growing evidence demonstrates that PTSD, anxiety/stress, and depression can lead to decreased immune response and increased risk of infections.”²² These illnesses are “linked with elevated stress levels,” which can impact immune responses.²³ Depression, anxiety, and PTSD impair the immune system, leading to increased risk of acute and prolonged infection, putting individuals with these symptoms “at increased risk of contracting and suffering from more severe forms of COVID-19.”²⁴

28. In many people, COVID-19 causes fever, cough, and shortness of breath. In some people it can result in serious illness or death.²⁵ Pneumonia is the most frequent serious manifestation of infection.²⁶

¹⁸ De Chang, et al., *Time Kinetics of Viral Clearance and Resolution of Symptoms in Novel Coronavirus Infection*, Am. J. of Respiratory and Critical Care Med. (Mar. 5, 2020) <https://tinyurl.com/y6vog5gr>.

¹⁹ *How COVID-19 Spreads*, CDC (Apr. 2, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last visited Apr. 5, 2020).

²⁰ Stephen A. Lauer et al., *The Incubation Period of Coronavirus Disease 2019 (COVID-19) From Publicly Reported Confirmed Cases: Estimation and Application*. Annals of Internal Med. (Mar. 10, 2020), <https://tinyurl.com/qnoccaj>.

²¹ See also Harv. Health Pub., *Coronavirus Resource Center*, Harv. Med. Sch. (Apr. 5, 2020), <https://tinyurl.com/wmdmeym>; *Groups at a Higher Risk for Severe Illness*, CDC (Apr. 2, 2020), <https://tinyurl.com/w4yd732>.

²² Minute Order, *Doe v. Barr*, No. 20-cv-02141 (N.D. Cal. Apr. 13, 2020) ECF No. 6, p. 6.

²³ *Id.* at p. 6-7.

²⁴ *Id.* at p. 7.

²⁵ *Symptoms of Coronavirus*, CDC (Mar. 20, 2020), <https://tinyurl.com/sj3ssz2>.

²⁶ Wei-jie Guan, et al., *Clinical Characteristics of Coronavirus Disease 2019 in China*, New Eng. J. of Med. (Feb. 28, 2020), <https://tinyurl.com/vjyep4w>.

29. The virus may also damage organs and organ systems such as the blood and the immune system. This damage is so extensive and severe that it may be enduring.²⁷ Patients who suffer severe symptoms from COVID-19 end up suffering damage to the walls and air sacs of their lungs, leaving debris in the lungs and causing the walls of lung capillaries to thicken so they are less able to transfer oxygen going forward. Studies of some patients in China and Hong Kong indicate a declined lung function of 20% to 30% even after recovery.²⁸

30. People of all ages can be infected and face serious illness or death.²⁹ There is no vaccine for or medication to treat COVID-19. The only known defense is to prevent people from being infected in the first place. This requires physically separation from known or potentially infected individuals, and vigilant hygiene,³⁰ impossible tasks at Dodge.

F. ICE and Dodge are Woefully Unprepared to Protect Mr. Morales Torres

31. ICE mandates that “[e]ach facility shall have written plans that address the management of infectious and communicable diseases.” The standards also mandate “compl[iance] with current and future plans implemented by federal, state or local authorities addressing specific public health issues.”³¹

32. Many immigration detention facilities lack adequate medical infrastructure to address the spread of infectious disease and treatment of people most vulnerable. Ex. H, ¶¶ 16–18.

Testing kits are not currently available in the volume necessary to screen detained noncitizens.

²⁷ Tianbing Wang, et al., *Comorbidities and multi-organ injuries in the treatment of COVID-19*, 395 *Lancet* 10228 (2020), <https://tinyurl.com/y783yhxp>; *GW Hospital Uses Innovative VR Technology to Assess Its First COVID-19 Patient*, *Geo. Wash. Univ. Hosp.*, (Mar. 19, 2020), <https://tinyurl.com/ybtmsmlo>.

²⁸ *Id.*

²⁹ *Severe Outcomes Among Patients with Coronavirus Disease 2019 (COVID-19) — United States, February 12–March 16, 2020*, *CDC Morbidity and Mortality Weekly Rep.* (Mar. 26, 2020), <https://tinyurl.com/wspcmu9> (“These preliminary data also demonstrate that severe illness leading to hospitalization, including ICU admission and death, can occur in adults of any age.”); Ex. H, ¶ 11 (noting infection rates in New York for people ages 18–44).

³⁰ *How to Protect Yourself & Others*, *CDC* (Apr. 4, 2020), <https://tinyurl.com/rnohcbc>.

³¹ *Performance-Based National Detention Standards: 4.3 Medical Care*, *USCIS*, 270 (Dec. 2016), <https://www.ice.gov/doclib/detention-standards/2011/4-3.pdf>.

And because certain individuals do not become symptomatic, or may spread the infection before or after they are symptomatic,³² even if a facility conducts symptom screening at booking, it is not possible to identify everyone who will become ill. For the same reason, symptom screening will not prevent the spread of coronavirus from staff, vendors, or contractors. Regardless, symptom screening is inadequate to mitigate the spread of coronavirus. *See* Ex. H. ¶¶ 5–7.

33. Dodge itself has provided minimal information about COVID-19. They have taken the temperature of detained individuals once, and have posted signs telling individuals to “stay home” and “practice social distancing” both of which are impossible there. Ex. B, ¶ 15. Beyond that, most information has come via television and outside communication. *Id.* ¶ 6.

34. There do not appear to have been any changes in protocols at Dodge in response to COVID-19. The detained noncitizens are responsible for cleaning their living area with the limited supplies they receive from the Facility, but the Facility has not clearly informed them of the need for enhanced cleaning or the specific threats that COVID-19 presents. Ex. B, ¶¶ 13, 14.

35. Dodge has taken no precautions to make social distancing possible. Mr. Morales Torres is in a housing unit with more than 50 other people. Ex. B, ¶ 7. They all touch and share the same items, including tables, exercise equipment, showers, and phones. *Id.*, ¶¶ 8-12.

36. Because of the impossibility of social distancing in detention, correctional public health experts have recommended the release from custody of people most vulnerable to COVID-19. Dr. Scott Allen and Dr. Josiah Rich, medical experts for DHS, urged Congress to instruct DHS to consider releasing *all* detained noncitizens who do not pose a risk to public safety, writing that they were “gravely concerned about the threat the novel coronavirus

³² Sam Whitehead, *CDC Director On Models For The Months To Come: 'This Virus Is Going To Be With Us'*, NPR (Mar. 31, 2020), <https://tinyurl.com/tlex8sq> (Interview with CDC Director Dr. Robert Redfield).

poses.”³³ There is an “‘imminent risk to the health and safety of immigrant detained noncitizens’ and to the general public if the novel coronavirus spreads in ICE detention.”³⁴ They warn that, “[t]o be more explicit, a detention center with a rapid outbreak could result in multiple detained noncitizens — five, ten or more — being sent to the local community hospital where there may only be six or eight ventilators over a very short period. As they fill up and overwhelm the ventilator resources, those ventilators are unavailable when the infection inevitably is carried by staff to the community.”³⁵

37. John Sandweg, former acting director of ICE, explained that “ICE is fortunate that the threat posed by these detention centers can be mitigated rather easily. By releasing from custody the thousands of detained noncitizens who pose no threat to public safety and do not constitute an unmanageable flight risk, ICE can reduce the overcrowding of its detention centers, and thus make them safer.”³⁶ He added that “ICE can quickly reduce the detained population without endangering our communities.”³⁷ He continued, “[w]hen an outbreak of COVID-19 occurs in an ICE facility, the detained noncitizens won’t be the only ones at risk. An outbreak will expose the hundreds of ICE agents and officers, medical personnel, contract workers, and others who work in these facilities to the virus. Once exposed, many of them will unknowingly take the virus home to their family and community.”³⁸

38. Given these obvious concerns, numerous courts have ordered the immediate release of noncitizens in light of COVID-19. *See* Minute Order, *Hernandez v. Kolutwenzew*, No. 2:20-cv-

³³ Priscilla Alvarez & Catherine E. Shoichet, *First ICE detainee tests positive for coronavirus*, CNN (Mar. 24, 2020), <https://tinyurl.com/sage5lw>.

³⁴ Catherine E. Shoichet, *Doctors warn of 'tinderbox scenario' if coronavirus spreads in ICE detention*, CNN (Mar. 20, 2020), <https://tinyurl.com/sstxgur>.

³⁵ *Id.*

³⁶ John Sandweg, *I Used to Run ICE. We Need to Release the Nonviolent Detained noncitizens*, The Atlantic (Mar. 22, 2020), <https://tinyurl.com/ya75993z>.

³⁷ *Id.*

³⁸ *Id.*

2088 (C.D. Ill. Apr. 9, 2020), ECF No. 9 (ordering immediate release from Jerome Combs Detention Center in Kankakee, Illinois); *Favi v. Kolitwenzew*, No. 2:20-cv-2087 (C.D. Ill. Apr. 10, 2020) ECF No. 15 (same); *Hernandez v. Kolitwenzew*, No. 2:20-cv-2088 (C.D. Ill. April. 9, 2020), ECF No. 9 (same).³⁹

39. One Wisconsin detention center took matters into its own hands. Kenosha County Detention Center decided to stop housing detained noncitizens on March 15, 2020, due to the extreme risk of COVID-19.⁴⁰

40. Even in criminal matters, individuals are being released from jails due to the risk of COVID-19. A federal judge in the Southern District of New York released a criminal defendant in pretrial detention on March 19, 2020, recognizing that “the unprecedented and extraordinarily dangerous nature of the COVID-19 pandemic has become apparent.”⁴¹ The Los Angeles County Sheriff decreased the jail population by ten percent within the last month.⁴² In Alameda County in Northern California eleven percent of the jail’s population was released in two weeks.⁴³ Other jurisdictions have acted similarly.⁴⁴

³⁹ See also *Xochihua-Jaimes v. Barr*, 2020 WL 1429877 (9th Cir. Mar. 24, 2020); *Basank v. Decker*, 2020 WL 1481503 (S.D.N.Y. Mar. 26, 2020); *Coronel v. Decker*, 2020 WL 1487274 (S.D.N.Y. Mar. 27, 2020); *Castillo v. Barr*, 2020 WL 1502864, No. CV 20-00605 TJH (C.D. Cal. Mar. 27, 2020); Temporary Restraining Order and Order to Show Cause, *Fraihat v. Wolf*, No. ED CV 20-590 (C.D. Cal. Mar. 30, 2020), ECF No. 18; *Thakker v. Doll*, 2020 WL 1671563 (M.D. Pa. Mar. 31, 2020); Temporary Restraining Order and Order to Show Cause, *Rodriguez v. Wolf*, No. 5:20-CV-627 (C.D. Cal. April 2, 2020), ECF Nos. 32, 35-39; Memorandum and Order, *Hope v. Doll*, No. 1:20-cv-562 (M.D. Pa. Apr. 7, 2020), ECF No. 11; *Malam v. Adduci*, 2020 WL 1672662 (E.D. Mich. Apr. 5, 2020); Opinion and Order, *Escobar v. Adduci*, intervenor in *Malam*, No. 5:20-cv-10829 (E.D. Mich. Apr. 9, 2020), ECF No. 29; *Rafael L.O. v. Tsoukaris*, 2020 WL 1808843 (D.N.J. Apr. 9, 2020); *Cristian A.R. v. Decker*, No. 20-3600 (D.N.J. Apr. 12, 2020); Minute Order, *Doe v. Barr*, No. 20-cv-02141 (N.D. Cal. Apr. 13, 2020) ECF No. 6.

⁴⁰ Kenosha News, *ICE detainees moved from Kenosha County Detention Center in COVID-19 precaution*, <https://tinyurl.com/y9k5xfmm>.

⁴¹ *United States v. Stephens*, 2020 WL 1295155, at *2 (S.D.N.Y. Mar. 19, 2020).

⁴² Justin Carissimo, *1,700 inmates released from Los Angeles County in response to coronavirus outbreak*, CBS News (Mar. 24, 2020), <https://tinyurl.com/vrxwd8f>.

⁴³ Bay City News, *Sheriff Releases 314 Inmates to Reduce Coronavirus Risk at Alameda County Jail*, NBC Bay Area, (Mar. 19, 2020), <https://tinyurl.com/yaf2b4b8>.

⁴⁴ See, e.g., Bob Heye, *Coronavirus and Crime: Jail releases, a rash of break-ins and one encouraging trend*, KATU (Mar. 23, 2020), <https://tinyurl.com/ydfkw7as>; Jerzy Shedlock, *Clark County Jail releases nearly 200 inmates due to COVID-19*, Columbian (Mar. 25, 2020), <https://tinyurl.com/y82jz8mg>; Scott Buffon, Coconino

EXHAUSTION

41. Mr. Morales Torres submitted a request to ICE for parole or release on recognizance on March 25, 2020. Ex. G. On April 3, 2020, ICE denied the request. *Id.* Because Mr. Morales Torres is ineligible to seek bond under 8 U.S.C. § 1226(c), there are no other available remedies.

LEGAL BACKGROUND

A. Mr. Morales Torres has a constitutional right to reasonable safety in custody.

42. When the government detains someone, it has an affirmative duty to provide for reasonable health and safety. As the Supreme Court has explained, “when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.”

DeShaney v. Winnebago Cty. Dep’t of Soc. Servs., 489 U.S. 189, 199-200 (1989). Thus, the government must provide “food, clothing, shelter, medical care, and reasonable safety.” *Id.* at 200 (citing *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)) (“An inmate must rely on prison authorities to treat his medical needs; [otherwise], those needs will not be met.”).

43. Those held in civil detention likewise are entitled to appropriate treatment and conditions of confinement, and their challenges to those conditions are evaluated on a more generous standard than in cases involving custody following a criminal conviction. *Youngberg v. Romeo*, 457 U.S. 307, 322 (1982); *Hughes v. Scott*, 816 F.3d 955, 956 (7th Cir. 2016) (“Remember that he’s not a prison inmate but a civil detainee.”). Civil detained noncitizens’ rights derive from the Due Process Clause rather than the Eighth Amendment. *See Belbachir v. Cty. of McHenry*, 726 F.3d 975, 979 (7th Cir. 2013) (Individuals in ICE custody are entitled to “at least as much protection” as individuals with criminal convictions, including “protection

County jail releases nonviolent inmates in light of coronavirus concerns, *Ariz. Daily Sun* (Mar. 20, 2020), <https://tinyurl.com/yddtg14t>.

from harm caused by a defendant’s deliberate indifference to the detainee’s safety or health” (citations omitted)); *Smith v. Dart*, 803 F.3d 304, 309 (7th Cir. 2015) (“In the context of a conditions of confinement claim, a pretrial detainee is entitled to be free from conditions that amount to ‘punishment,’ while a convicted prisoner is entitled to be free from conditions that constitute ‘cruel and unusual punishment.’” (citations omitted)); *Hardeman v. Curran*, 933 F.3d 816, 821 (7th Cir. 2019) (differentiating pretrial detention as “unrelated to punishment”).

44. To establish constitutionally deficient conditions of confinement, a civil detainee must prove the conditions are “objectively unreasonable.” *See Hardeman*, 933 F.3d at 822-23 (pretrial detainee’s claims of general conditions of confinement “are subject only to the objective unreasonableness inquiry”); *Miranda v. Cty. of Lake*, 900 F.3d 335, 352 (7th Cir. 2018) (medical care claims brought by pretrial detainee subject to objective unreasonableness inquiry).

45. Thus, the Government owes a duty to Mr. Morales Torres, as a civil immigration detainee, to reasonably abate known risks. Even where the risk of harm may be unknown or unpredictable, the Seventh Circuit has said that it is inexcusable (*i.e.* “deliberately indifferent”) to fail to undertake “simple, inexpensive, obvious,” mitigation measures where the possible adverse consequences are great. *Belbachir*, 726 F.3d at 981–82 (matter involving suicide by a noncitizen, finding placing the individual in a hospital or on suicide watch simple and obvious precautions). In the context of COVID-19, courts have already concluded that “[c]onfining vulnerable individuals such as Petitioners without enforcement of requisite social distancing and without specific measures to protect their delicate health” violates the constitution. *Basank*, 2020 WL 1481503, at *5; *see also Coronel*, 2020 WL 1487274, at *4-6 (Government’s actions in response to COVID-19 were inadequate to mitigate the transmission of the virus); Memorandum & Order at 22 n.15, *Thakker v. Doll*, No. 1:20-cv-00480-JEJ (M.D. Pa Mar. 31, 2020), ECF No.

47 (concluding that petitioners, detained noncitizens, established a likelihood of success under either the Fifth or more onerous Eighth Amendment standard).

46. Conditions that meet the deliberate indifference standard undoubtedly meet the more lenient “objectively unreasonable” standard. *See Farmer v. Brennan*, 511 U.S. 825, 842 (1994) (“[A] factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious”); *see also Helling v. McKinney*, 509 U.S. 25, 33 (1993) (expressing “great difficulty” finding lack of deliberate indifference where authorities “ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering” such as “*exposure of inmates to a serious, communicable disease*”) (emphasis added); *Hardeman*, 933 F.3d at 824-25 (finding water deprivation and unsanitary jail conditions “objectively unreasonable” (quotations omitted)); *Fambro v. Fulton Cty., Ga.*, 713 F. Supp. 1426, 1430-31 (N.D. Ga. 1989) (holding that “[d]eliberate indifference to serious medical needs is established where there are systematic deficiencies that “subject[] other inmates to unnecessary risk of contracting dangerous or fatal communicable diseases”).

47. Conditions that pose an unreasonable risk of future harm violate the Constitution, even if that harm has not yet come to pass. *Helling*, 509 U.S. at 33. “It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them.” *Id.* Jail officials cannot ignore a condition of confinement that is sure to cause “serious illness and needless suffering,” including “*exposure of inmates to a serious, communicable disease.*” *Id.* The risk of exposure to COVID-19 constitutes exactly the type of “unsafe, life-threatening condition” that “need not await a tragic event” in order to be remedied. *Id.* at 33-34.

48. Although none of ICE’s confirmed cases have been at Dodge, “[t]here are many opportunities for COVID-19 to be introduced into a correctional or detention facility, including daily staff ingress and egress; transfer of incarcerated/detained persons between facilities and systems” and the limited “ability of incarcerated/detained persons to exercise disease prevention measures”⁴⁵ means that the spread is all but inevitable.⁴⁶

49. The risk is especially true because at Dodge, things are essentially business as usual. There has been no assurance that “staff and incarcerated/detained persons who require respiratory protection (e.g., N95s) for their work responsibilities have been medically cleared,” nor have there been policy changes to ensure frequent cleaning of high-touch surfaces, as recommended by the CDC.⁴⁷ Where the government “by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs,” such inaction violates the due process clause. *Hardeman*, 933 F.3d at 825 (quoting *DeShaney*, 489 U.S. at 200).

B. This Court has authority to order release and such relief is appropriate here.

50. “When necessary to ensure compliance with a constitutional mandate, courts may enter orders placing limits on a prison’s population.” *Brown v. Plata*, 563 U.S. 493, 511 (2011). Courts have exercised this authority to remedy constitutional violations caused by overcrowding. *Duran v. Elrod*, 713 F.2d 292, 297-98 (7th Cir. 1983), *cert. denied*, 465 U.S. 1108 (1984), and the same principle applies here. As the constitutional principles and public health experts make

⁴⁵ *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CDC (Mar. 23, 2020), <https://tinyurl.com/ue7v8w4>.

⁴⁶ *See, e.g.*, Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 *Clinical Infectious Diseases* 1047, 1047 (Oct. 2007), <https://doi.org/10.1086/521910> (noting that in jails “[t]he probability of transmission of potentially pathogenic organisms is increased by crowding, delays in medical evaluation and treatment, rationed access to soap, water, and clean laundry, [and] insufficient infection-control expertise”).

⁴⁷ *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CDC (Mar. 23, 2020), <https://tinyurl.com/ue7v8w4>.

clear, releasing Mr. Morales Torres is the only viable remedy to ensure his safety from the threat of COVID-19. He has underlying physical and mental conditions that put him at higher risk of becoming infected with COVID-19 and of severe illness if he contracts it.

51. The Second Circuit recently found that “[c]ourts can and must help ensure that constitutional boundaries are not transgressed by considerations of expediency. At the same time, the careful balancing of needs and rights that such emergencies require is likely not best achieved by protracted and contentious litigation after the fact, and certainly not at the appellate level.” *Fed. Defenders of N.Y. v. Fed. Bureau of Prisons*, 2020 WL 1320886, at *12 (2d Cir. Mar. 20, 2020).

52. Social distancing and hygiene measures are Mr. Morales Torres’s only defense against COVID-19. Those measures are impossible in an immigration detention center, where Mr. Morales Torres shares showers, eats in communal spaces, and is in close contact with the many other detained noncitizens and officers around him. Numerous courts have now ordered release of civil detained noncitizens like Mr. Morales Torres in light of the threat of COVID-19. *See supra* ¶ 38 * n. 39, and this Court should do the same.

C. Prolonged detention violates the Due Process Clause.

53. In addition, Mr. Morales Torres’s detention is unconstitutionally prolonged. Respondents are detaining Mr. Morales Torres under 8 U.S.C. § 1226(c), the statutory provision for mandatory detention based on criminal convictions. But that authority to detain “give[s] way” when an individual’s continued detention violates the constitution. *Malam v. Adducci, et al.*, No. 20-10829, 2020 WL 1672662, at *13 (E.D. Mich. Apr. 5, 2020).

54. As the Supreme Court has noted, “It is well established that the Fifth Amendment entitles [noncitizens] to due process of law in deportation proceedings.” *Demore*, 538 U.S. at 523

(quoting *Reno v. Flores*, 507 U.S. 292, 306 (1993)). “Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of liberty” that the Due Process Clause protects. *Zadvydas*, 533 U.S. at 690. This fundamental due process protection applies to noncitizens, even if they are removable or inadmissible. *See id.* at 721 (Kennedy, J., dissenting) (“[B]oth removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious.”). Under these due process principles, detention must “bear [a] reasonable relation to the purpose for which the individual [was] committed.” *Id.* at 690 (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)).

55. Due process therefore requires “adequate procedural protections” to ensure that the government’s justification for physical confinement “outweighs the individual’s constitutionally protected interest in avoiding physical restraint.” *Id.* at 690 (internal quotations omitted). The Supreme Court has recognized only two valid purposes for civil immigration detention—to mitigate risk of danger to the community and to prevent flight. *Id.*; *Demore*, 538 U.S. at 538.

56. Following *Zadvydas* and *Demore*, every circuit court to confront the issue has protected the due process rights of people detained in civil immigration detention when that detention becomes unreasonable, even when those individuals are subject to “mandatory detention” under 8 U.S.C. § 1226(c). *See Sopo v. U.S. Att’y Gen.*, 825 F.3d 1199 (11th Cir. 2016) (addressing prolonged detention for individual subject to mandatory detention under 8 U.S.C. § 1226(c)); *Reid v. Donelan*, 819 F.3d 486 (1st Cir. 2016) (same); *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015) (same); *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015) *overruled by Jennings v. Rodriguez*, 138 S. Ct. 830 (2018) (same); *Diop v. ICE*, 656 F.3d 221 (3d Cir. 2011) (same); *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003) (requiring release when mandatory detention becomes unreasonable).

57. While the Seventh Circuit has not explicitly addressed the issue, it has noted that “[i]t would be a considerable paradox to confer a constitutional or quasi-constitutional right to release on an alien ordered removed,” as required by *Zadvydas*, “but not on one who might have a good defense to removal.” *Hussain v. Mukasey*, 510 F.3d 739, 743 (7th Cir. 2007). There, the Court suggested that if a noncitizen with a final order of removal has a right to be free from prolonged detention—the context at issue in *Zadvydas*—then so too must a noncitizen “before he is subjected to a final order of removal.” *Id.*

58. In 2018, the Supreme Court’s decision in *Jennings* addressed this line of cases in a class action brought by classes facing prolonged detention under two different statutes, 8 U.S.C. §§ 1226(c), 1225(b). The Court resolved that case on statutory grounds, holding that the Ninth Circuit erred by interpreting Sections 1226(c) and 1225(b) to require bond hearings. *Jennings*, 138 S. Ct. at 842. Because the Ninth Circuit had not decided whether the Constitution itself requires bond hearings in cases of prolonged detention, the Court expressly declined to reach that issue and remanded. *Id.*; see also *Nielsen v. Preap*, 139 S. Ct. 954, 972 (2019) (“Our decision today on the meaning of [Section 1226(c)] does not foreclose as-applied challenges—that is, constitutional challenges to applications of the statute as we have now read it.”).

59. On remand from the Supreme Court, the Ninth Circuit cast “grave doubts that any statute that allows for arbitrary prolonged detention without any process is constitutional or that those who founded our democracy precisely to protect against the government’s arbitrary deprivation of liberty would have thought so.” *Rodriguez v. Marin*, 909 F.3d 252, 256 (9th Cir. 2018). The case is currently pending before the district court.

60. The answer to the question left open by the Supreme Court is: Yes, due process requires that the government to release or, at a minimum, provide bond hearings to noncitizens

facing prolonged detention. Where a noncitizen has been detained for a prolonged period or is pursuing a substantial defense to removal, due process requires an individualized determination that such a significant deprivation of liberty is warranted. *Demore*, 538 U.S. at 532 (Kennedy, J., concurring) (“individualized determination as to his risk of flight and dangerousness” may be warranted “if the continued detention became unreasonable or unjustified”); see also *Jackson v. Indiana*, 406 U.S. 715, 733 (1972) (detention beyond the “initial commitment” requires additional safeguards); *McNeil v. Dir., Patuxent Inst.*, 407 U.S. 245, 249-50 (1972) (“lesser safeguards may be appropriate” for “short-term confinement”).

61. Since *Jennings*, “[c]ourts in this circuit and across the country regularly grant habeas relief to [detained noncitizens] whose mandatory detention without bond pending removal is unconstitutional as applied to them.” *Vargas v. Beth*, 378 F. Supp. 3d 716, 728 (E.D. Wis. 2019) (collecting cases). The court in *Vargas* went on to find that “[w]hen the length and conditions of detention raise due process concerns, the government must prove that continued detention is necessary to achieve its purpose, i.e. to protect against flight or dangerousness.” *Id.* at 727.

62. Another recent case from this district is particularly analogous in that the prolonged nature of the detention resulted from the government’s repeat appeals of grants of protection. In *Doe v. Beth*, 2019 WL 1923867, at *4 (E.D. Wis. Apr. 30, 2019), the Court held that ICE had unconstitutionally prolonged Petitioner’s detention following a third remand from the Seventh Circuit to the BIA. “[A]t some point the continuation of the proceeding may as a practical matter approach the indefinite mark that has mandated a bail hearing in so many other cases. We have reached that point here.” *Doe*, 2019 WL 1923867, at *4; see also *Jarpa v. Mumford*, 211 F. Supp. 3d 706, 718 (D. Md. 2016) (finding detention unreasonable where the noncitizen had been granted relief but detained pending government appeal). Cognizant of these considerations, when

the government appeals a grant of protection, ICE has a longstanding policy to “favor release” during a government appeal “absent exceptional concerns” not present here. *See* Ex. F, Tabs A and B (addressing ICE’s policy for release in this context).

63. “Nearly all district courts that have considered the issue agree that prolonged mandatory detention pending removal proceedings, without a bond hearing, will—at some point—violate the right to due process.” *Banda v. McAleenan*, 385 F. Supp. 3d 1099, 1116 (W.D. Wash. 2019) (internal citations and quotations omitted); *Glennis H. v. Rodriguez*, 2019 WL 2866069, at *2 (D.N.J. July 2, 2019) (“Whether detention under § 1226(c) is constitutional continues to be a function of the length of the detention,’ whereby the constitutional case for continued detention without inquiry into its necessity becomes more and more suspect as detention continues.”).

D. Applying relevant factors, Mr. Morales Torres’s detention is unreasonable.

64. The Supreme Court has suggested that detention becomes prolonged when it exceeds six months. *See Demore*, 538 U.S. at 529-30 (upholding only “brief” detentions under Section 1226(c), which last “roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal”); *Zadvydas*, 533 U.S. at 701 (“Congress previously doubted the constitutionality of detention for more than six months”).

65. Other courts have taken an more individualized approach and considered numerous factors including “(1) the total length of detention to date, including whether immigration detention exceeds the time the alien spent in prison for the crime that allegedly renders him removable; (2) the likely duration of future detention; (3) the conditions of detention, including whether the facility for civil immigration detention is meaningfully different from a penal

institution for criminal detention; (4) whether delays in removal proceedings were caused by the detainee or the government; and (5) the likelihood that the removal proceedings will result in a final order of removal.” *Vargas*, 378 F. Supp. at 728.

66. The factors outlined in *Vargas* fall in Mr. Morales Torres’s favor. First, Mr. Morales Torres has been detained in civil immigration custody for 18 months, having served no term of imprisonment for his criminal convictions. And this detention is likely to continue indefinitely. No briefing schedule has been issued on the Government’s second appeal, and it is unclear if one is forthcoming given widespread immigration court closures and the need for the production of paper transcripts to initiate briefing. And once the briefing starts, it is common for appeals to the BIA to remain pending for three or more months. *See* 8 C.F.R. § 1003.1(e)(8). In other words, Mr. Morales Torres faces two years of detention before he can even effectively *start* briefing any denial of protection at the Seventh Circuit.

67. The factor relating to likely success also falls in Mr. Morales Torres’s favor. Indeed, the fact that Mr. Morales Torres has twice been granted relief is particularly significant because the government will have to demonstrate clear error as to the immigration judge’s dispositive factual findings. *See Anderson v. Bessemer City*, 470 U.S. 564 (1985); *see also Estrada-Martinez v. Lynch*, 809 F.3d 886, 895 (7th Cir. 2015) (remanding where BIA failed to properly apply clear error standard of review to CAT grant). As such, the BIA will have to be left with “the definite and firm conviction that a mistake has been committed” to sustain the government’s appeal. *Anderson*, 470 U.S. at 573.

68. The passage of time in this case is also not the product of undue delay by Mr. Morales Torres. Though it is true that he “requested continuances in his administrative

proceedings,” Ex. A, p. 8, in order to secure a necessary mental health evaluation, the majority of time in detention at this point is attributable to the government’s multiple appeals.

69. And finally the circumstances of confinement are an especially compelling factor in favor of release. Courts look at “whether the facility for the civil immigration detention is meaningfully different from a penal institution,” *Sajous v. Decker*, 2018 WL 2357266, at *11 (S.D.N.Y. May 23, 2018), often finding that when detained noncitizens are housed in county jails, as is the case here, there is no meaningful difference between civil and punitive detention. *Arana v. Barr*, 2020 WL 1659713, at *4 (S.D.N.Y. Apr. 3, 2020). That factor bears particular weight given the risk of COVID-19 as discussed extensively above.

70. In sum, compliance with Due Process requires this court to consider whether “continued detention [is] unreasonable and no longer authorized.” *Zadvydas*, 533 U.S. at 680. Both Mr. Morales Torres’s continued detention and the risk he faces of contracting COVID-19 require this Court to answer that question in the negative.

E. Alternatively, Due Process requires a bond hearing with procedural protections.

71. For the reasons addressed above, Mr. Morales is eligible for and should receive an order granting his release. But at a minimum, he should receive a bond hearing where the government must bear the burden of proof by clear and convincing evidence to justify continued detention, taking into consideration available alternatives to detention; and if the government cannot meet its burden, the noncitizen’s ability to pay a bond.

72. To justify prolonged immigration detention, the government must bear the burden to prove by clear and convincing evidence that the noncitizen presents a danger or flight risk. *See, e.g., Lopez Reyes v. Bonnar*, 362 F. Supp. 3d 762, 775 (N.D. Cal. 2019) (“If due process requires a second bond hearing, the government would bear the burden to prove [] dangerousness by clear

and convincing evidence at that hearing.”); *Guerrero-Sanchez v. Warden York County Prison*, 905 F. 3d 208, 224 n.12 (3d Cir. 2018).

73. Where the Supreme Court has permitted civil detention, it has relied on the fact that the Government bore the burden of proof at least by clear and convincing evidence. *See United States v. Salerno*, 481 U.S. 739, 750 (1987) (upholding pretrial detention following a “full-blown adversary hearing,” requiring “clear and convincing evidence” and a “neutral decisionmaker”); *Foucha v. Louisiana*, 504 U.S. 71, 81-83 (1992) (striking down civil detention scheme that placed burden on the detainee); *Zadvydas*, 533 U.S. at 692 (post-final-order custody review procedures deficient because, among other things, they placed burden on detainee).

74. Due process also requires consideration of alternatives to detention. The primary purpose of immigration detention is to ensure a noncitizen’s appearance during removal proceedings. *Zadvydas*, 533 U.S. at 697. Detention is not reasonably related to this purpose where release conditions could mitigate any risk. *See Bell v. Wolfish*, 441 U.S. 520, 538 (1979).

75. Due process likewise requires consideration of a noncitizen’s ability to pay a bond. That is, the detention of an “indigent [person], whose appearance at trial could reasonably be assured by one of the alternate forms of release, . . . for inability to post money bail would constitute imposition of an excessive restraint.” *Pugh v. Rainwater*, 572 F.2d 1053, 1058 (5th Cir. 1978) (en banc); *Hernandez v. Sessions*, 872 F.3d 976, 990-91 (9th Cir. 2017) (concluding that due process likely requires “consideration of the detained noncitizens’ financial circumstances, as well as of possible alternative release conditions . . . to ensure that the conditions of their release will be reasonably related to the governmental interest in ensuring their appearance at future hearings”).

76. A bond hearing would be insufficient here for multiple reasons. Most importantly, the immigration court is not the tribunal in which Mr. Morales Torres's constitutional due process claims can be heard or remedied. Immigration judges lack the authority to remedy constitutional violations. *McCarthy v. Madigan*, 503 U.S. 140, 147-48 (1992) (“[A]n agency . . . may be unable to consider whether to grant relief because it lacks institutional competence to resolve the particular type of issue presented, such as the constitutionality of a statute . . . Alternatively, an agency may be competent to adjudicate the issue presented, but still lack authority to grant the type of relief requested.”); *Yanez v. Holder*, 149 F. Supp. 2d 485, 489 (N.D. Ill. 2001) (holding that immigrant habeas petitioner need not exhaust his constitutional claims before the immigration court because it has no authority to remedy them); *Singh v. Reno*, 182 F.3d 504, 510 (7th Cir.1999) (administrative agencies lack authority to “deal with [constitutional claims] dispositively”).

77. And as a practical matter, it may take several weeks for the immigration court to schedule, hear, and adjudicate a bond hearing, and every day that Mr. Morales Torres remains in detention is a day in which he is dangerously at risk of contracting COVID-19. *See also Joseph v. Decker*, 2018 WL 6075067, at *7 (S.D.N.Y. Nov. 21, 2018), *appeal withdrawn*, 2019 WL 3334802 (2d Cir. May 1, 2019) (The district court was “convinced that it is the only entity able to address Joseph’s substantial constitutional claims and that any attempt to receive relief from the agency would pointlessly prolong a detention that is already pushing constitutional bounds.”). To remedy the humanitarian crisis and constitutional violations discussed in this Petition, this Court should exercise its power to order Mr. Morales Torres’s outright release.

CLAIMS FOR RELIEF

COUNT I

Violation of Fifth Amendment Right to Substantive Due Process (Conditions of Confinement)

78. Mr. Morales Torres repeats and re-alleges the allegations in the preceding paragraphs.

79. Due Process guarantees that civil detainees, including noncitizens, may not be subjected to punishment. The federal government violates this substantive due process right when it subjects civil detainees to cruel treatment and conditions of confinement that amount to punishment or does not ensure those detained noncitizens' safety and health.

80. Respondents' conditions of confinement subject Mr. Morales Torres to heightened risk of contracting COVID-19, for which there is no vaccine, known treatment, or cure. Mr. Morales Torres risks serious illness and death if infected. Because of the conditions in the detention facilities, Mr. Morales Torres is not able to take steps to protect himself—including social distancing, using hand sanitizer, wearing personal protective equipment such as gloves and face masks, or disinfecting common surfaces. Respondents have not provided adequate protections to Mr. Morales Torres. In the particular circumstances of this case, the only reasonable way to abate the risk COVID-19 poses to Mr. Morales Torres is to release him immediately. Respondents are subjecting Mr. Morales Torres to a substantial risk of serious harm, in violation of Mr. Morales Torres's rights under the Due Process Clause.

81. The state's interest in detaining nonviolent noncitizens indefinitely must yield to the public's greater interest in preserving public health and safety.

82. Thus, Respondents' ongoing detention of Mr. Morales Torres violates Due Process.

COUNT II
Violation of Fifth Amendment Right to Substantive Due Process
(Failure to Provide Adequate Medical Care)

83. Mr. Morales Torres repeats and re-alleges the allegations in the preceding paragraphs.

84. Due Process guarantees detained noncitizens the right to be provided with adequate medical care. The government violates that guarantee where it is unable to provide adequate medical care during an outbreak of a contagious disease.

85. Mr. Morales Torres's underlying medical conditions put him at a higher risk of contracting and suffering serious complications or death from COVID-19.

86. Respondents are aware of the serious risks of COVID-19 and yet has not taken any necessary or appropriate precautions to provide appropriate medical care to Mr. Morales Torres. Respondents have not changed Mr. Morales Torres's living conditions, meal times, or any other aspect of Mr. Morales Torres's daily schedule to permit him to maintain appropriate social distancing. Respondents have not provided Mr. Morales Torres with face masks or gloves to protect himself, or with hand sanitizer or sufficient cleaning agents in order to maintain appropriate levels of hygiene. Nor has the government been willing to release Mr. Morales Torres so he can provide for his medical needs on his own. In the particular circumstances of this case, the only reasonable way to abate the risk COVID-19 poses to Mr. Morales Torres is to release him immediately. The medical care provided by Respondents is objectively unreasonable under the circumstances.

COUNT III
Violation Of Fifth Amendment Procedural Due Process
(Prolonged Detention)

87. Mr. Morales Torres repeats and re-alleges the allegations in the preceding paragraphs.

88. Mr. Morales Torres is entitled to procedural due process protections. Although the mandatory detention statute has been upheld against a statutory challenge, it may still be unconstitutional when detention has become unreasonably prolonged.

89. As applied to individuals with viable claims for relief, mandatory detention fails under *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976), which requires a court to weigh the individual's interest and the risk of erroneous deprivation of that interest against the government's interest. *See Chavez-Alvarez v. Warden York Cty. Prison*, 783 F.3d 469, 474-75 (3rd Cir. 2015) (“[D]ue process requires us to recognize that, at a certain point—which may differ case by case—the burden to an alien's liberty outweighs a mere presumption that the alien will flee and/or is dangerous.”)

90. Here, Mr. Morales Torres's interest is substantial—freedom from physical restraint is an interest that “lies at the heart of the liberty that [the Due Process] Clause protects.” *Zadvydas*, 533 U.S. at 690.

91. The government's interest in detaining noncitizens during deportation proceedings is to effectuate removal. As to noncitizens with viable legal defenses, this interest is diminished. In Mr. Morales Torres's case, for example, where detained awaiting government appeal, the likelihood that the government will be legally permitted to remove him is reduced. Mr. Morales Torres has been found credible, recognized as a member of the LGBTQ community and granted protection by an IJ on that basis and because of his mental illnesses. Given the overwhelming evidence of violence against LGBTQ people and those with mental illness in Mexico, he has a viable claim to protection and a strong incentive to pursue it. He has every incentive to appear at any proceedings because it is likely that he will ultimately be granted protection.

92. Mr. Morales Torres was detained in September 2018. He has already been in detention 18 months, and there is not a clear end in sight.

93. Absent judicial relief, Mr. Morales Torres will likely spend significantly more time in detention. He is currently awaiting a briefing schedule on the government's appeal. In light of the many cases delayed due to COVID-19 and widespread immigration court closures, it may take months for the BIA to address this case. At least three more months of detention is all but guaranteed, and six or eight more months, if not more, is likely.

PRAYER FOR RELIEF

Because the Dodge County Detention Center is a congregate environment where the risk of the spread of COVID-19 is imminent and serious, and for all the other reasons explained above, Mr. Morales Torres requests that the Court grant the following relief:

- a. Assume jurisdiction over this matter;
- b. Issue a Writ of Habeas Corpus and order Mr. Morales Torres's immediate release, with appropriate precautionary public health measures, on the ground that his continued detention violates the Due Process Clause;
- c. Declare that Mr. Morales Torres's continued detention in civil immigration custody given COVID-19, violates the Due Process Clause;
- d. Issue a Writ of Habeas Corpus and order Mr. Morales Torres's immediate release, on the ground that his prolonged detention violates the Due Process Clause;
- e. Declare that Mr. Morales Torres's continued prolonged detention in civil immigration custody, violates the Due Process Clause;
- f. In the alternative, should the Court not grant immediate release, order a bond hearing within four days where the government bears the burden to prove flight risk and

dangerousness; Mr. Morales Torres's ability to pay a bond is taken into consideration; and alternatives to detention are considered.

g. Award Mr. Morales Torres his costs and reasonable attorneys' fees in this action under the Equal Access to Justice Act, as amended, 5 U.S.C. § 504 and 28 U.S.C. § 2412, and on any other basis justified under law; and;

h. Grant any other appropriate relief.

Dated: April 17, 2020

s/ Mark Fleming
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* Given COVID-19, this is the best number to call for scheduling.

CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2020, I filed a true and correct copy of the foregoing document electronically on CM/ECF.

I further certify that I served the foregoing by email on:

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