

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

DAGO ALBERTO (“NICOLE”) GARCIA
AGUILAR
(A# 206-003-752),

Petitioner,

v.

KIRSTJEN NIELSEN, in her official capacity as Secretary of the U.S. Department of Homeland Security; RONALD D. VITIELLO, in his official capacity as Deputy Director and Senior Official Performing the Duties of Director of U.S. Immigration and Customs Enforcement; WILLIAM BARR, in his official capacity as Attorney General of the United States; FLOYD SAM FARMER, in his official capacity as Acting Field Office Director, El Paso Field Office, U.S. Immigration and Customs Enforcement; DEAN KING, in his official capacity as Supervisory Detention and Deportation Officer, U.S. Immigration and Customs Enforcement, Cibola County Correctional Center; CHAD MILLER, in his official capacity as Warden of the Cibola County Correctional Center,

Respondents.

PETITION FOR A WRIT OF HABEAS CORPUS

Introduction

1. Petitioner Dago Alberto “Nicole” Garcia Aguilar,¹ just 24 years old, fled Honduras and sought asylum in the United States on April 23, 2018.
2. In Honduras, Ms. Garcia Aguilar survived unspeakable cruelty and persecution—

¹ Ms. Garcia Aguilar is a transgender woman who was assigned male at birth but identifies as female and uses the first name Nicole. Counsel refer to her using feminine pronouns.

death threats, rape, attempted murder, and police threats and misconduct, all because she is transgender.

3. On October 9, 2018, an immigration judge granted Ms. Garcia Aguilar asylum, concluding that she suffered persecution on account of her gender identity and that she will continue to suffer if the United States government returns her to Honduras.² The government appeals the immigration judge’s decision to the Board of Immigration Appeals (“BIA”). The government’s primary argument is a difficult one for them. They argue that the judge erred in finding Ms. Garcia Aguilar credible, a conclusion that the BIA will only be able to reverse if it has a “definite and firm conviction that a mistake has been committed.”³

4. Despite her asylum grant and U.S. Immigration and Customs Enforcement’s (“ICE’s”) longstanding policy that noncitizens who have been granted asylum generally merit release from detention pending appeal, ICE nevertheless persists in detaining her during the pendency of the appeal.

5. ICE has detained Ms. Garcia Aguilar in three different units in the Cibola County Correctional Center (“Cibola”), a private prison operated by CoreCivic—formerly Corrections Corporation of America or CCA—in Milan, New Mexico.

6. First, beginning on May 7, 2018, ICE detained Ms. Garcia Aguilar in a housing unit for transgender women at Cibola.

7. Beginning in late May 2018, ICE repeatedly removed Ms. Garcia Aguilar from the transgender women’s unit and repeatedly detained her in solitary confinement for periods lasting between a few days to nearly three months. Altogether, Ms. Garcia Aguilar has spent

² Ex. A, “Written Decision of the Immigration Judge,” dated Oct. 9, 2018.

³ *Kabba v. Mukasey*, 530 F.3d 1239, 1245 (10th Cir. 2008) (internal quotation marks and citations omitted).

several months in solitary confinement.

8. Most notably, Ms. Garcia Aguilar was placed in protective “administrative segregation,” a form of non-disciplinary solitary confinement, from November 2018 to around February 20, 2019, solely because of her gender identity.⁴

9. ICE has repeatedly detained Ms. Garcia Aguilar in solitary confinement despite the fact that she has been diagnosed with bipolar disorder, anxiety, and depression—health conditions that are exacerbated by solitary confinement. Cibola medical staff have repeatedly noted that Ms. Garcia Aguilar is deteriorating physically and emotionally in this setting.

10. The medical staff’s findings are consistent with research on solitary confinement: solitary confinement is psychologically damaging for people with no history of mental illness, and it exacerbates the existing symptoms of mental illness for people like Ms. Garcia Aguilar who do have a history of mental illness.

11. If solitary confinement is generally psychologically damaging, solitary confinement at Cibola is brutal. Although ICE describes this form of detention as “segregation” or “segregated housing,” solitary confinement at Cibola is near isolation. When ICE incarcerates Ms. Garcia Aguilar in solitary confinement, she typically remains isolated in her cell for 23 hours each day without access to telephones or her commissary account.⁵

12. Finally, since February 2019, during the short periods when ICE has not detained Ms. Garcia Aguilar in the solitary confinement unit, it has detained her in a unit with cisgender men in ICE custody, despite the fact that she is a woman.

13. Respondents recently released Ms. Garcia Aguilar from solitary, and have told her

⁴ Ex. B, Records of Administrative Segregation of Nicole Garcia Aguilar, November 26, 2018–February 20, 2019 (Two Months and 25 Days).

⁵ Ex. C, Decl. of Nicole Garcia Aguilar, dated April 10, 2019, at ¶ 9.

that she will never return to the transgender unit.⁶

14. Since April 23, 2018, when the government first detained her nearly one year ago, no neutral arbiter has ever reviewed Ms. Garcia Aguilar's lengthy detention to determine whether it is warranted. In other words, no judge has ever determined whether her detention is reasonably related to preventing her flight during her immigration proceedings or preventing danger to the community.

15. Having recently won asylum in the United States, Ms. Garcia Aguilar now brings this Petition to challenge her prolonged and unlawful detention in ICE custody.

16. Ms. Garcia Aguilar's prolonged detention violates the Due Process Clause of the Fifth Amendment. Due Process requires that civil immigration detention be reasonably related to preventing a person's flight or danger to the community. It also requires adequate procedures to ensure that the government is actually accomplishing its goals by detaining a person.

17. At minimum, Ms. Garcia Aguilar requests that this Court issue an Order to Show Cause to the Respondents, set a hearing on her Petition, and order an immediate bond hearing before this Court or before the Immigration Judge, where the government has the burden of justifying by clear and convincing evidence that Ms. Garcia Aguilar's continued detention is necessary to prevent her flight or to protect public safety.⁷

⁶ *Id.* at ¶ 6.

⁷ Under 28 U.S.C. § 2243, "[a] court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto. The writ, or order to show cause[,] shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed. The person to whom the writ or order is directed shall make a return certifying the true cause of the detention. When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed. Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to

18. But Due Process requires even more: this Court should order Ms. Garcia Aguilar's immediate release because her detention bears no reasonable relation to any government purpose.

Jurisdiction and Venue

19. Ms. Garcia Aguilar is currently detained in the custody of Respondents at the Cibola County Correctional Center in Milan, New Mexico.

20. Jurisdiction is proper under 28 U.S.C. §§ 1331 and 2241 and the Suspension Clause, U.S. Const., art. I, § 9, cl. 2.

21. Venue is proper in the District of New Mexico because Petitioner Garcia Aguilar is detained in the District, and Respondent Chad Miller, the Cibola Warden and Petitioner's immediate custodian, resides in the District. 28 U.S.C. § 1391 (venue proper in any district in which a defendant resides).

Parties

22. Nicole Garcia Aguilar is a 24-year-old woman from Honduras who fled her country to seek asylum in the United States. She presented herself to immigration officers at a port of entry to the United States in April 2018 and was detained by those officers. She is now detained in ICE custody in the Cibola County Correctional Center in Milan, New Mexico.

23. Respondent Kirstjen Nielsen is sued in her official capacity as the Secretary of the Department of Homeland Security ("DHS"). In this capacity, Respondent Nielsen directs DHS

produce at the hearing the body of the person detained. The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts. The return and all suggestions made against it may be amended, by leave of court, before or after being filed. The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

and ICE. Respondent Nielsen is responsible for administering federal immigration laws⁸ and she is a legal custodian of Ms. Garcia Aguilar.

24. Respondent Ronald Vitiello is sued in his official capacity as the Deputy Director and Senior Official Performing the Duties of Director of U.S. Immigration and Customs Enforcement (“ICE”), a sub-agency of DHS. In this capacity, Respondent Vitiello directs ICE, the agency that is responsible for detaining noncitizens in removal proceedings and oversees Ms. Garcia Aguilar’s detention at the Cibola County Correctional Center.

25. Respondent William Barr is sued in his official capacity as the Attorney General of the United States. In this capacity, he is responsible for administering the immigration laws under 8 U.S.C. § 1103, and he is a legal custodian of Ms. Garcia Aguilar.

26. Respondent Floyd Sam Farmer is sued in his official capacity as the Acting Field Office Director of the El Paso ICE Field Office, which has administrative jurisdiction over Ms. Garcia Aguilar’s detention. He is a legal custodian of Ms. Garcia Aguilar.

27. Respondent Dean King is sued in his official capacity as Supervisory Detention and Deportation Officer, U.S. Immigration and Customs Enforcement, at the Cibola County Correctional Center. He is a legal custodian of Ms. Garcia Aguilar.

28. Respondent Chad Miller is sued in his official capacity as the warden of the Cibola County Correctional Center, where Ms. Garcia Aguilar is incarcerated. Warden Miller’s address is: 2000 Cibola Loop, Milan, New Mexico 87021. He is a legal custodian of Ms. Garcia Aguilar.

⁸ 8 U.S.C. § 1103 (“[t]he Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of alien”).

Factual Background

29. Nearly one year ago, on April 23, 2018, Ms. Garcia Aguilar presented herself to U.S. immigration officials at the Nogales, Arizona port of entry and asked for asylum.

30. Since then, the government has detained her.

31. She is now detained by ICE at the Cibola County Correctional Center, a private prison in Milan, New Mexico.

ICE denied parole requests and no judge has reviewed her detention.

32. In 2018, Ms. Garcia Aguilar requested parole, or release from immigration detention, based on her status as an asylum seeker.

33. ICE Defendants denied her request.

34. Ms. Garcia Aguilar recently renewed her request for parole or for release on her own recognizance. She argued in particular that release was justified in light of her asylum grant.⁹ She argued that her prolonged detention pending DHS's appeal contravenes ICE's longstanding policy favoring release of similarly situated noncitizens, particularly where there is no evidence that Ms. Garcia Aguilar poses a danger to national security or the community, and she has every incentive and ample support to comply with the conditions of her release.¹⁰

⁹ Ex. D, Request for Parole or Release on Her Own Recognizance, Nicole Garcia Aguilar, dated March 15, 2019.

¹⁰ See Ex. E, Memorandum from John Kelly, Secretary, DHS, to Devin McAleenan, Acting Commissioner, U.S. Customs and Border Protection, *et al.*, "Implementing the President's Border Security and Immigration Enforcement Improvements Policies," dated Feb. 20, 2017; Ex. F, Message from Gary Mead, Executive Associate Director, Enforcement and Removal Operations, to Assistant Directors, Field Office Directors, Deputy Field Office Directors, and Assistant Field Office Directors, re "Reminder on Detention Policy Where an Immigration Judge has Granted Asylum, Withholding of Removal or CAT," dated Mar. 6, 2012; and Ex. G, Memorandum to Anthony Tangeman, Deputy Executive Associate Commissioner, Office of Detention and Removal, from Michael J. Garcia, Assistant Secretary, U.S. Immigration and Customs Enforcement, re "Detention Policy Where an Immigration Judge has Granted Asylum and ICE has Appealed," dated Feb. 9, 2004.

35. ICE denied her request on March 20, 2019.¹¹

36. In addition to having been denied parole by ICE, during the nearly one year the government has detained her, she has never received the most basic of procedural protections: a bond hearing before a judge.

The immigration judge granted asylum but ICE persists in detaining Petitioner.

37. On October 9, 2018, Immigration Judge Eileen Trujillo of the Denver Immigration Court found that Ms. Garcia Aguilar sustained her burden in showing that she is eligible for asylum and granted her application for asylum.

38. The immigration judge granted Ms. Garcia Aguilar asylum based on persecution she experienced in Honduras including rape, attempted murder, death threats, and police threats—all because she is transgender. In one of the last interactions she had with Honduran police before she fled her community, the police told her that the violence against her was “because of the way [she is]” and it would not “stop until [she’s] dead.”¹²

39. The government has appealed the grant of asylum to the BIA, alleging that the immigration judge erred in finding Ms. Garcia Aguilar credible. But the Board of Immigration Appeals must defer to the immigration judge’s credibility finding unless it has a “definite and firm conviction that a mistake has been committed.”¹³

ICE has detained Petitioner for an inappropriate duration and in inhumane circumstances.

40. Not only have Defendants detained Ms. Garcia Aguilar for a prolonged period, they have done so in improper settings that put her at significant risk of harm and mistreatment.

41. First, beginning on May 7, 2018, Respondents detained her in the transgender unit

¹¹ Ex. H, ICE Notification Declining to Grant Parole, dated Mar. 19, 2019.

¹² Ex. A, “Written Decision of the Immigration Judge,” dated Oct. 9, 2018, at 4.

¹³ *Kabba*, 530 F.3d at 1245 (10th Cir. 2008).

in Cibola County Correctional Center.

42. But beginning in late May 2018, ICE repeatedly removed Ms. Garcia Aguilar from the transgender women's unit and detained her for prolonged periods in solitary confinement.¹⁴

43. Because Cibola, a mixed-use private prison, only has a single solitary confinement unit, ICE incarcerates Ms. Garcia Aguilar in a solitary cell block with cisgender men in county and U.S. Marshals custody and other people in ICE custody.

44. Ms. Garcia Aguilar has spent a cumulative period of several *months* in solitary confinement. On one occasion, ICE detained her for a single period of nearly three months in "administrative segregation," purportedly for her own safety.

45. Behavioral health evaluations of Ms. Garcia Aguilar indicate her chronic struggle with anxiety, depression, nightmares, and panic attacks, which were exacerbated by her detention in solitary confinement.

46. On December 3, 2018, at a time when ICE was detaining Ms. Garcia Aguilar in solitary confinement, the staff physician Dr. Mary Birdsong wrote in an evaluation of Ms. Garcia

¹⁴ In attempting to justify her repeated placement in solitary confinement, Cibola has at times invoked arbitrary disciplinary justifications, and at other times has claimed that it is incarcerating Ms. Garcia Aguilar in a solitary cell for her own safety. Regardless of justification, these conditions of confinement are solitary confinement. Under the United Nations Standard Minimum Rules for the Treatment of Prisoners solitary confinement "refer[s] to the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement . . . refer[s] to solitary confinement for a time period in excess of 15 consecutive days." Rule 44, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/295/06/PDF/N1529506.pdf?OpenElement>. The Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, has urged that solitary confinement for periods of more than fifteen consecutive days constitutes torture, and that young people and people, like Ms. Garcia Aguilar, who live with mental illness should never be held in solitary confinement. Interim Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc A/66/268, ¶¶ 76-78 (Aug. 5, 2011).

Aguilar: “I truly felt like I was in a room with a wild animal pacing...I feel that segregation magnifies this plus bad weather limits recreation. **At no time did I feel patient was threatening.**”¹⁵ While Dr. Birdsong’s comparison of Ms. Garcia Aguilar to a wild animal was poor, her observation is clear: solitary confinement exacerbates Ms. Garcia Aguilar’s mental illness.

47. Although ICE describes what Ms. Garcia Aguilar has faced as “segregation” or “segregated housing,” solitary confinement at Cibola is near isolation: Ms. Garcia Aguilar typically remains isolated in her cell for 23 hours each day.¹⁶

48. Yet ICE continued to detain Ms. Garcia Aguilar in “protective” solitary confinement for months, until February 2019, despite her repeated requests to be placed in the general population of any unit—whether in the transgender unit or the male unit—rather than solitary confinement.¹⁷

49. Finally, since February 2019, Respondents have detained Ms. Garcia Aguilar with cisgender men in ICE custody, even though she is a woman and even though this placement puts her at additional risk of physical violence in custody.¹⁸

50. Respondents have never given Ms. Garcia Aguilar an opportunity to administratively appeal their housing decisions.

Petitioner does not pose a risk of flight or danger to the community, meaning the government cannot justify her detention.

51. Ms. Garcia Aguilar poses no danger to the community and is not subject to

¹⁵ Ex. I, Evaluation of Ms. Garcia Aguilar by Dr. Mary Birdsong, M.D., dated Dec. 3, 2018.

¹⁶ Decl. of Nicole Garcia Aguilar, dated April 10, 2019, at ¶ 9.

¹⁷ See, e.g., Ex. J, Grievance of Ms. Garcia Aguilar, dated Jan. 15, 2019, and Grievance Response, dated Jan. 17, 2019.

¹⁸ Decl. of Nicole Garcia Aguilar, dated April 10, 2019, at ¶¶ 7 and 10.

mandatory detention. She has been convicted of simple possession of marijuana, but that conviction does not make her inadmissible or subject to mandatory detention under 8 U.S.C. § 1226(c). And while she has been charged with prostitution, those charges remain pending. More broadly, Ms. Garcia Aguilar's criminal history involves no violence or harm to any person or property. As such, there is no evidence that she poses a danger to the community.

52. Although ICE's long-standing policy regarding post-asylum-grant detention does not require a noncitizen to demonstrate ties to the community, Ms. Garcia Aguilar's ample support from her long-term fiancé and his family provide additional support for her release from detention. In addition to her fiancé, Ashley Edgette, a friend of Ms. Garcia Aguilar who works with Mariposas Sin Fronteras, has also committed to sponsor her for release.¹⁹

53. Additionally, Ms. Garcia Aguilar has been offered support from local LGBTQ rights advocates in Houston, Texas called Organización Latina de Trans en Texas (OLTT). The organization has offered logistical support for her court and ICE appearances, referrals to medical and mental health services, as well as a community of support.²⁰

54. Ms. Garcia Aguilar has every incentive to comply with the terms of her release from detention. As a transgender woman, she faced relentless abuse in Honduras and now fears that she will face physical and sexual abuse, torture, and even death because of her gender identity. Throughout Honduras, LGBT individuals are targets of pervasive violence and death with impunity by government actors and members of the community alike. She has already been granted asylum and has every incentive to fight the government's appeal of that decision.²¹

¹⁹ Ex. D, Request for Parole or Release on Her Own Recognizance, Nicole Garcia Aguilar, dated March 15, 2019.

²⁰ *Id.*

²¹ *Id.*

Exhaustion

55. Ms. Garcia Aguilar filed her most recent request for release on parole on March 15, 2019. ICE denied her request for parole on March 21, 2019.²²

56. There are no further administrative procedures that Ms. Garcia Aguilar is required to exhaust.

Legal Background

57. The government is incarcerating Ms. Garcia Aguilar under 8 U.S.C. § 1225(b)(1)(B)(ii). That detention statute applies to people who are otherwise subject to expedited removal, but who establish a “credible fear of persecution” during an interview with an asylum officer. People who establish a credible fear of persecution have shown that there is a “significant possibility” that they are eligible for asylum in the United States.²³

58. Section 1225(b)(1)(B)(ii) provides that people who establish a credible fear of persecution “shall be detained for further consideration” of their application for asylum, which occurs at a removal hearing inside the United States. “The credible fear standard is designed to

²² Because she is detained under the El Paso ICE Field Office, which has jurisdiction over all of New Mexico and West Texas, Ms. Garcia Aguilar is a member of the *Damus* class. *Damus v. Nielsen*, No. 18–578 (JEB), 2018 WL 3232515 (D.D.C. July 2, 2018). On July 2, 2018, the Honorable James E. Boasberg of the U.S. District Court for the District of Columbia entered a preliminary injunction in *Damus* against five U.S. Immigration and Customs Enforcement (ICE) Field Offices: Detroit, El Paso, Los Angeles, Newark, and Philadelphia. The preliminary injunction requires the five ICE Field Offices to follow the 2009 ICE Parole Directive, “Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture,”

https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf; prohibits them from detaining class members absent an individualized determination that they present a flight risk or danger to the community; and prohibits them from denying parole based on categorical criteria applicable to all class members.). As a member of the *Damus* class, Ms. Garcia Aguilar sought release from immigration detention through parole. Now, however, she seeks a distinct form of relief: release from detention under the Due Process Clause because her detention is unconstitutionally prolonged and is not reasonably related to a legitimate government purpose.

²³ *Id.* § 1225(b)(1)(B)(v).

weed out non-meritorious cases so that only applicants with a likelihood of success will proceed to the regular asylum process. If the alien meets this threshold, the alien is permitted to remain in the U.S. to receive a full adjudication of the asylum claim—the same as any other alien in the U.S.”²⁴

59. Arriving noncitizens are not eligible for bond hearings before an immigration judge even after they have passed their credible fear interviews.²⁵

60. The statute provides that people in Ms. Garcia Aguilar’s situation—those who presented themselves at ports of entry and request asylum—should receive a credible fear interview. ICE officers (in other words, the jailing authorities) informally conduct parole reviews to consider a person’s eligibility for release.²⁶ ICE officers make parole decisions—at times, resulting in months or years of additional incarceration—by checking boxes on a form that contains no explanation of the factual basis for the decision.

61. The Respondents’ own parole directive—a policy that then-DHS Secretary John Kelly affirmed in 2017 “shall remain in full force and effect”—indicates that DHS favors the release of arriving asylum seekers.²⁷

²⁴ H.R. Rep. No. 104-469, pt. 1, at 158 (1996); *see also Grace v. Whitaker*, 344 F. Supp. 3d 96, 107 (D.D.C. 2018) (“Congress intended the credible fear determinations to be governed by a low screening standard.”)

²⁵ *See* 8 C.F.R. 1003.19(h)(2)(i) (“[A]n immigration judge may not redetermine conditions of custody . . . [for] [a]rriving aliens in removal proceedings.”).

²⁶ 8 U.S.C. § 1182(d)(5)(A); *see also Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018).

²⁷ Ex. E, Memorandum from John Kelly, Secretary, DHS, to Devin McAleenan, Acting Commissioner, U.S. Customs and Border Protection, *et al.*, “Implementing the President’s Border Security and Immigration Enforcement Improvements Policies,” dated Feb. 20, 2017; *see also* Noah Lanard, “Did the Supreme Court Issue a Major Immigration Ruling Under False Pretenses?” MOTHER JONES (Jan. 18, 2019), <https://www.motherjones.com/politics/2019/01/did-the-supreme-court-issue-a-major-immigration-ruling-under-false-pretenses/>.

62. And the Due Process Clause forbids prolonged arbitrary imprisonment. “Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty” that the Due Process Clause protects.²⁸ Under due process principles, detention must “bear [a] reasonable relation to the purpose for which the individual [was] committed.”²⁹

63. Due process protects all people, including removable and inadmissible noncitizens.³⁰ These interests are particularly relevant where, as here, the applicant has been granted asylum.³¹

64. Due process requires a person’s release when their detention is no longer reasonably related to a government purpose.

65. At a minimum, due process requires “adequate procedural protections” to ensure that the government’s asserted justification for physical confinement “outweighs the individual’s constitutionally protected interest in avoiding physical restraint.”³²

66. Prolonged civil detention is impermissible without an individualized hearing before a neutral decisionmaker who tests the Government’s justification for incarceration.³³

²⁸ *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

²⁹ *Id.* at 690 (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)).

³⁰ See *Rosales-Garcia v. Holland*, 322 F.3d 386, 409 (6th Cir. 2003) (en banc) (holding that “excludable aliens . . . are clearly protected by the Due Process Clauses of the Fifth and Fourteenth Amendments.”). See also *Zadvydas*, 533 U.S. at 721 (Kennedy, J., dissenting) (noting that “both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious”); *Chi Thon Ngo v. I.N.S.*, 192 F.3d 390, 396 (3d Cir. 1999), amended (Dec. 30, 1999) (“Even an excludable alien is a ‘person’ for purposes of the Fifth Amendment and is thus entitled to substantive due process.”).

³¹ See *Jarpa v. Mumford*, 211 F. Supp. 3d 706, 718 (D. Md. 2016) (finding detention unreasonable where the noncitizen had been granted relief but continued to be detained pending the government’s appeal).

³² *Zadvydas*, 533 U.S. at 690 (internal quotation marks omitted).

³³ See *United States v. Salerno*, 481 U.S. 739, 750–51 (1987) (upholding civil pretrial detention of individuals charged with crimes only upon individualized findings of dangerousness or flight

67. In *Jennings*, the Supreme Court held that Section 1225(b) authorizes detention until the conclusion of removal proceedings without a bond hearing.³⁴ However, the Court did not address the constitutionality of prolonged detention without a bond hearing.³⁵

68. Outside the national security context, the Supreme Court has never authorized prolonged civil confinement without the bedrock protection of an individualized hearing as to the need for incarceration.³⁶

Claims for Relief

Count One

(Violation of the Due Process Clause of the Fifth Amendment to the U.S. Constitution – Right to a Bond Hearing)

69. Petitioner re-alleges and incorporates by reference the paragraphs above.

70. The Due Process Clause of the Fifth Amendment forbids the government from depriving any “person” of liberty “without due process of law.”³⁷

71. To justify Petitioner’s ongoing prolonged detention, due process requires that the government establish, at an individualized hearing before a neutral decisionmaker, that Petitioner’s detention is justified by clear and convincing evidence of flight risk or danger, even after consideration whether alternatives to detention could sufficiently mitigate that risk.

risk at custody hearings); *Foucha v. Louisiana*, 504 U.S. 71, 81–83 (1992) (requiring individualized finding of mental illness and dangerousness for civil commitment); *Kansas v. Hendricks*, 521 U.S. 346, 357 (1997) (upholding civil commitment of sex offenders after jury trial on lack of volitional control and dangerousness); *Ly v. Hanson*, 351 F.3d 263, 273 (6th Cir. 2003) (holding, on constitutional avoidance grounds, that “the reasonableness of the length of detention is subject to review by federal courts in habeas proceedings” and affirming grant of habeas to noncitizen detained 18 months).

³⁴ 138 S. Ct. at 845.

³⁵ *Id.* at 851 (“[W]e do not reach [the constitutional] arguments.”).

³⁶ See *Toyosaburo Korematsu v. United States*, 323 U.S. 214 (1944); *Ludecke v. Watkins*, 335 U.S. 160 (1948); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953).

³⁷ U.S. Const. amend. V.

72. For these reasons, Petitioner's ongoing prolonged detention without a hearing violates due process.

Count Two
(Due Process—Right to Release)

73. Petitioner re-alleges and incorporates by reference the paragraphs above.

74. There is no reasonable relation between Ms. Garcia Aguilar's detention and a government interest.

75. Indeed, she is being detained after having won asylum and despite the fact that she poses no risk of flight or danger to the community.

Prayer for Relief

Having won asylum, Ms. Garcia Aguilar respectfully requests that this Court:

a. Issue a Writ of Habeas Corpus directing the Respondents to immediately release Ms. Garcia Aguilar from custody;

b. Or, alternatively, Issue a Writ of Habeas Corpus ordering an immediate bond hearing before this Court or before the Immigration Judge, where the government bears the burden of showing, by clear and convincing evidence, that Ms. Garcia Aguilar's ongoing detention is justified based on a risk of flight or dangerousness;

c. Issue a declaration that Ms. Garcia Aguilar's ongoing, indefinite detention violates the Due Process Clause of the Fifth Amendment;

d. Award Ms. Garcia Aguilar's costs and reasonable attorneys' fees in this action under the Equal Access to Justice Act;³⁸ and

e. Grant any other relief which this Court deems just and proper.

³⁸ 28 U.S.C. § 2412.

Respectfully submitted this 10th day of April, 2019, in Albuquerque, New Mexico:

/s/ Kristin Greer Love
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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Dago Alberto ("Nicole") Garcia Aguilar

DEFENDANTS

KIRSTJEN NIELSEN, et al.

(b) County of Residence of First Listed Plaintiff Cibola (EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Kristin Greer Love, Leon Howard (ACLU of NM 1410 Coal Ave SW, Abq, NM 87102, 505-266-5915, x1007); Tania Linares Garcia, Keren Zwick

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question, 4 Diversity

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, PTF, DEF, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions.

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes various legal categories and checkboxes.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District, 6 Multidistrict Litigation - Transfer, 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 28 U.S.C. §§ 1331 and 2241 and the Suspension Clause, U.S. Const., art. I, § 9, cl. 2. Brief description of cause: Habeas petition challenging the prolonged detention of an asylum seeker under the Due Process Clause

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE 04/10/2019 SIGNATURE OF ATTORNEY OF RECORD [Signature]

FOR OFFICE USE ONLY RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE