UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

KOSSI DEGBE Petitioner #A097-619-142 vs. KEITH DEVILLE, Warden, Winn Correctional Center; DIANE L. WITTE, Director, New Orleans Field Office, Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement; HENRY LUCERO, Executive Associate Director, Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement; TAE JOHNSON, Senior Official Performing the Duties of the Director, U.S. Immigration and Customs Enforcement; DAVID PEKOSKE, Senior Official Performing the Duties of the Deputy Secretary, Department of Homeland Security; MONTY WILKINSON, Acting Attorney General Respondents-Defendants	Civil No. Judge Magistrate Judge

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

Petitioner, Kossi Degbe, by and through undersigned counsel, hereby petitions this Court for a writ of habeas corpus to remedy his unlawful detention, and to enjoin his continued unlawful detention by the Respondents. In support of this petition and complaint for injunctive relief, Petitioner alleges as follows.

I. CUSTODY

1. Petitioner is in the custody of U.S. Immigration and Customs Enforcement ("ICE") and has been since February of 2020. He is currently detained in the Winn Correctional Center in Winnfield, Louisiana. ICE has contracted with the Winn Correctional Center to house immigration detainees such as Mr. Degbe. Mr. Degbe is under the control of the Respondents and their agents.

II. JURISDICTION

2. This action arises under the Constitution of the United States and the Immigration and Nationality Act ("INA") §§ 101–507, 8 U.S.C. § 1101–1537 (2018), *amended by* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 1570.

3. This Court has jurisdiction under 28 U.S.C. § 2241 (2018), the Suspension Clause, U.S. Const. art. I § 9, cl. 2 and 28 U.S.C. § 1331 (2018), as Petitioner is presently in custody under color of the authority of the United States, and his custody is in violation of the Constitution, laws, or treaties of the United States. *See Zadvydas v. Davis*, 533 U.S. 678 (2001).

4. This Court may grant relief pursuant to 28 U.S.C. § 2241, 5 U.S.C. § 702 and the All Writs Act, 28 U.S.C. § 1651.

5. Congress has preserved judicial review of challenges to prolonged immigration detention. *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018) (holding that 8 U.S.C. §§ 1226(e) and 1252(b)(9) do not bar review of constitutional challenges to prolonged immigration detention).

III. VENUE

6. Venue is appropriate in this Court pursuant to 28 U.S.C. §1391(e) (2018) because the Winn Correctional Center and Petitioner reside in this District and Division, and because several of the Respondents are officers or employees of the United States.

IV. PARTIES

7. Petitioner, Kossi Degbe, is a native of Togo. He fled political persecution in his homeland and came to the United States in 2005 as an asylee. Mr. Degbe is subject to an order of removal that became administratively final on April 28, 2014. In total, he has spent more than four years in ICE custody.

8. Respondent Keith Deville is the Warden of the Winn Correctional Center in Winnfield, Louisiana and, therefore, has direct control over Mr. Degbe.

9. Respondent Diane L. Witte is the ICE New Orleans Field Office Director for Enforcement and Removal Operations. She is Mr. Degbe's immediate custodian.

10. Respondent Henry Lucero is the ICE Executive Associate Director for Enforcement and Removal Operations. He is responsible for managing the detention of noncitizens and the execution of final orders of removal. In this official capacity, Mr. Lucero is also a legal custodian of Mr. Degbe.

11. Respondent Tae Johnson is the ICE Senior Official Performing the Duties of the Director. He, too, is therefore a custodian of Mr. Degbe.

12. Respondent David Pekoske is the Senior Officer Performing the Duties of the Deputy Secretary of the Department of Homeland Security. He is responsible for the administration of ICE and enforcement of the INA. As such, he is also a custodian of Mr. Degbe.

13. Respondent Monty Wilkinson is the Acting Attorney General of the United States. He is responsible for the administration of ICE and implementation of the INA. As such, he is also a custodian of Mr. Degbe.

V. FACTUAL ALLEGATIONS/STATEMENTS OF FACT

Mr. Degbe Was Initially Released from ICE Custody Because ICE Failed to Secure the Necessary Travel Documents to Remove Him.

14. Mr. Degbe, a national of Togo, came to the United States in 2005 as an asylee. His status was adjusted to legal permanent resident on April 25, 2007.

15. On October 16, 2008, Mr. Degbe was convicted by plea of second-degree rape[1]—a deportable offense. He was sentenced to serve twenty years in prison by the Circuit Court of Montgomery County, Maryland. *State of Md. v. Degbe*, No. 110473C (Md. Cir. Ct. Oct. 16, 2008).

16. Before his arrest, Mr. Degbe was developing strong bonds with friends, family, and the community.

17. He served nearly four years of his sentence in the custody of the State of Maryland. On December 14, 2011, while in state custody, Mr. Degbe was issued a Notice to Appear before ICE. On June 21, 2012, the State of Maryland transferred Mr. Degbe to ICE custody.

18. Mr. Degbe did not request early deportation. He is unaware if federal or state authorities sought his transfer. Nonetheless, it is clear from common law and federal

[1] To this day, Mr. Degbe maintains that he is innocent. As is all too common, he pled guilty because he felt pressure to do so by the criminal legal system. *See* William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2459-2550 (2004) (stating that pleas determine prosecutors' ability to threaten inflated sentences and allows them to control "who goes to prison and for how long.").

policy that once Petitioner was transferred to ICE custody, his detention no longer qualified as serving his state criminal sentence.[2]

19. After Mr. Degbe was transferred to ICE custody, an Immigration Judge heard his case, and he was ordered removed on August 12, 2012. He timely appealed to the Board of Immigration Appeals, but the Immigration Judge's order was affirmed. His order of removal became administratively final on April 28, 2014.

20. On January 15, 2015, after spending nearly three years in ICE detention, Mr. Degbe filed a habeas petition in the U.S. District Court for the District of Maryland. He sought release from immigration detention because it had been more than six months since he had been ordered removed and Togo refused to issue his travel documents. Mr. Degbe argued that, under *Zadvydas,* he was being improperly detained by ICE and should be released under an order of supervision (Pet. Ex. G, First Habeas Petition).

21. On January 16, 2015, the U.S. District Court for the District of Maryland issued an order to show cause requiring ICE to explain why Mr. Degbe should not be released. (Pet. Ex. H, MD District Court Order).

22. Rather than respond to the court's order, ICE released Mr. Degbe from custody on February 18, 2015 and placed him on an order of supervision because Togo would not issue him travel documents (Pet. Ex. I, Declaration of Deportation Officer Christian Lewis). ICE then filed a motion to dismiss Petitioner's habeas petition as moot (Pet. Ex J, ICE Motion to Dismiss).

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[2] *See* U.S. Dep't of Justice, Fed. Bureau of Prisons, Program Statement 5880.28, Sentence Computation Manual (CCCA of 1984) at 1-15A (1999) ("Official detention does not include time spent in the custody of the U.S. Immigration and Naturalization Service ('INS')."). In sum, "official detention" for the purpose of serving a criminal sentence cannot be served while in ICE custody. *See, e.g.*, *Ramirez-Osorio v. INS*, 745 F.2d 937, 944 (5th Cir. 1984) ("A deportation proceeding is a civil, not criminal, action.") (citing *INS v. Lopez-Mendoza,* 468 U.S. 1032, 1042-43 (1984)); *Shoaee v. INS*, 704 F.2d 1079 (9th Cir. 1983); *Cabral-Avila v. INS*, 589 F.2d 957, 959 (9th Cir. 1978) ("The deportation proceeding, despite the severe consequences, has consistently been classified as a civil, rather than a criminal matter.").

23. After his release from ICE custody, Mr. Degbe continued to build on the strong community bonds he had started to cultivate before his arrest. He became an active member of Our Lady of Sorrows Catholic Church in Takoma Park, MD. Father Emmanuel Effah, priest at Our Lady of Sorrows, describes Mr. Degbe as "respectful, humble, serviceable, hardworking, and punctual at all church activities," and also someone who "is kind and generous to others and towards me." (Pet. Ex. B, Letter from Fr. Emmanuel Effah).

24. During the nearly three-year period during which he was detained by ICE, Mr. Degbe did not have any disciplinary issues.

25. After his release in 2015, in full cooperation with ICE—and in accordance with the conditions of his release—Mr. Degbe attended every required ICE check-in.

Mr. Degbe Was Re-Arrested in February 2020 and Has Continued to Languish in ICE Custody for More Than 11 Months Due to ICE's Apparent Inability to Procure the Necessary Travel Documents.

26. Nonetheless, absent any apparent reason or explanation, Mr. Degbe was unexpectedly re-arrested by ICE in February 2020.

27. Since his re-arrest, Mr. Degbe has been transferred to multiple ICE detention facilities without explanation. Mr. Degbe has been detained at facilities in Arizona, Alabama, Texas, Maryland, and Louisiana. Unfortunately, it is not uncommon for ICE to ship detainees around the country arbitrarily. In fact, several courts have expressed concern that this practice likely violates an immigrant detainee's right to due process. *See, e.g.*, *Orantes-Hernandez v. Thornburgh,* 919 F.2d 549 (9th Cir. 1990) (affirming permanent injunction that admonished ICE for transferring detainees without regard to their established attorney-client relationships); *Hamama v. Adducci,* 261 F. Supp. 3d 820, 836 (E.D. Mich. 2017) (noting that "Petitioners" efforts to prepare and file motions

have been stymied by their successive transfers to out-of-state facilities . . . the effect of these transfers has been to severely disrupt this [due process] right."), *vacated on other grounds*, 912 F.3d 869 (6th Cir. 2018); *Arroyo v. U.S. Dep't of Homeland Sec.*, No. SACV 19-815 JGB, 2019 WL 2912848 (C.D. Cal. June 20, 2019) (finding that plaintiffs were likely to succeed on the merits of their claim that ICE's transferring them to a remote facility violated their due process rights).

28. Mr. Degbe is currently detained at Winn Correctional Center in Louisiana.

29. Mr. Degbe has been in ICE custody now for more than eleven consecutive months.

30. There is no reason to believe that, in the intervening years between Mr. Degbe's initial release from ICE custody and re-detention, ICE gained newfound ability to procure the travel documents at issue in 2015. This is not surprising. According to the Congressional Research Service Report of Recalcitrant Countries, Togo is considered a country at risk of non-compliance with United States requests for it to effectuate removal of its citizens.[3]

The Raging COVID-19 Pandemic Makes It Highly Unlikely that ICE Will Be Able to Effectuate Mr. Degbe's Removal in the Foreseeable Future.

31. Togo's lack of cooperation and the ongoing coronavirus ("COVID-19") pandemic make it extremely unlikely that ICE will be able to effect Mr. Degbe's deportation in the reasonably foreseeable future.

32. Since his detention was initiated in February 2020, more than 100 million individuals worldwide have confirmed COVID-19 diagnoses—including more than 25.4 million in

[3] *See* Jill H. Wilson, Cong. Research Serv., IF11025, Immigration: "Recalcitrant" Countries and the Use of Visa Sanctions to Encourage Cooperation with Alien Removals (2020).

the United States.[4] More than 2.1 million individuals worldwide have died as a result of the virus, including more than 420 thousand in the United States.[5] Those numbers are growing exponentially, with an average of more than 170 thousand new cases daily in the U.S. during the month of January.[6] In Louisiana in particular, cases are increasing, and in January reached their highest point since the pandemic began.[7]

33. Moreover, Mr. Degbe suffers from hypertension and benign prostatic hyperplasia ("BPH"). BPH involves a prostate gland that has increased in size. (Pet. Ex. M, Medical Records). Symptoms include complications with urination. It sometimes takes Mr. Degbe more than twenty minutes to use the bathroom. This extra time spent in the bathroom puts Mr. Degbe at a greater risk for contracting COVID-19 due to his prolonged close proximity to other detainees and compromised hygienic conditions in the bathroom. If left untreated, BPH can cause kidney damage, numerous urinary tract infections, bleeding, bladder stones, and urinary retention.[8] While BPH does not seem to increase the fatality rates of COVID-19 patients, the virus can lead to permanent renal problems for those who survive.[9]

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[4] *Coronavirus World Map: Tracking the Global Outbreak*, N.Y. Times, https://www.nytimes.com/interactive/2020/world/coronavirus-maps.html (last visited Jan. 27, 2021).

[5] *Id*.

[6] *Id*.

[7] *Id.*

[8] *Prostate Enlargement (Benign Prostatic Hyperplasia)*, Nat'l Inst. of Diabetes & Digestive & Kidney Diseases, https://www.niddk.nih.gov/health-information/urologic-diseases/prostate-problems/prostate-enlargement-benign-prostatic-hyperplasia (Sept. 2014).

[9] C. John Sperati, *Coronavirus: Kidney Damage Caused by COVID-19*, Johns Hopkins Med., https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/coronavirus-kidney-damage-caused-by-covid19 (last updated May 14, 2020).

34. Hypertension is a condition characterized by high blood pressure. This condition puts Mr. Degbe at an increased risk of experiencing severe COVID-19 symptoms if he were to contract the virus.

35. Both conditions (BPH and hypertension) make Mr. Degbe more likely to suffer from COVID-19 complications than healthy individuals that come down with the virus. According to public data, around 4% of the people with hypertension who have contracted COVID-19 have died, compared to a lethality rate of 1.1% in patients without COVID-19.[10]

36. Recognizing that Mr. Degbe is at a heightened risk for suffering from COVID-19 complications, on July 2, 2020, the Clinical Law Program of the University of Maryland sent a Humanitarian Parole Request to the Baltimore ICE field office on behalf of Mr. Degbe (Pet. Ex. K, Parole Request). Invoking the urgent humanitarian factors outlined in INA § 212(d)(5)(A), this request outlined the risk that COVID-19 poses to Mr. Degbe due to his preexisting conditions. On July 20, 2020, ICE denied this request. The agency's response letter acknowledged the hardships that Mr. Degbe and his family may be experiencing, but decided that his experience did not fit into any of the categories that would allow for his parole (Pet. Ex. LICE Denial of Parole Request).

37. Mr. Degbe is concerned about becoming a casualty of the pandemic. This is perfectly reasonable considering the fact that an individual sleeping on the bunk next to him tested positive for the virus (Pet. Ex. A, Degbe Declaration, ¶22). Mr. Degbe has

[10] European Soc'y of Cardiology Press Release, High Blood Pressure Linked to Increased Risk of dying from COVID-19, (Jun. 5, 2020).

expressed concern that the quarantine section of Winn is located in close proximity to his sleeping area. *Id.*

38. Mr. Degbe is also concerned that Winn's COVID-19 prevention measures are substantially lacking. Mr. Degbe has witnessed guards not wearing masks on multiple occasions. (Pet. Ex. A, Degbe Declaration, ¶27). This is an issue of grave concern, as the guards are in contact with people from outside the facility when they are not at work. Additionally, Mr. Degbe has been given only two cloth masks, (*Id.* at Degbe Declaration, ¶26). While these cloth masks can be washed after frequent use, there is no guarantee that Mr. Degbe will always have access to soap or cleaning supplies to properly wash masks, which is necessary for their continuous effectiveness.

39. Furthermore, socially distancing at the facility is not possible. The bunks where the inmates sleep are within an arm's reach of one another, far less than the six feet of distance advised by the Center for Disease Control. (*Id.* at Degbe Declaration, ¶22).

51. Unfortunately, as the number of confirmed COVID-19 cases grow, Mr. Degbe is now at greater risk of contracting COVID-19 than ever before. To date, 287 detainees at Winn Correctional Center have tested positive for COVID-19; one is now dead.[11]

52. Because of Mr. Degbe's preexisting conditions and the inadequate hygienic standards at Winn Correctional Center, Mr. Degbe's prolonged stay at the facility is putting his life at risk.

If Released on Parole, Mr. Degbe Will Benefit from the Emotional and Financial Support of Family and Friends.

40. Mr. Degbe enjoys the support of his family and friends who are eager to help him once he is released. His brother-in-law, Edem Kodjo Noameshie, has offered housing for

[11] *See ICE Guidance on COVID-19*, U.S. Immigr. & Customs Enf't, https://www.ice.gov/coronavirus (last accessed Jan. 26, 2021).

Mr. Degbe upon his release. (Pet. Ex. D Letter from Edem Kodjo Noameshie). His cousin, Abraham Togbe, has also offered financial assistance and housing. (Pet. Ex. E, Letter from Fr. Abraham Togbe).

41. Between the time of his release from ICE custody in 2015 and subsequent unexplained re-arrest, Mr. Debge was employed at a local restaurant called WingStop. More importantly, he was active in his community, volunteering for a food distribution program at CASA de Maryland. (Pet. Ex. E, Letter from Fr. Abraham Togbe).

42. Without intervention from this Court, Mr. Degbe will face continued and indefinite detention, possibly for several years or even the remainder of his natural life.

VI. EXHAUSTION OF REMEDIES

43. Mr. Degbe has exhausted his administrative remedies to the extent required by law, and his only remedy is by way of this judicial action.

44. After the Supreme Court's decision in *Zadvydas*, Attorney General Ashcroft issued a memorandum outlining how noncitizens may seek release from custody pursuant to *Zadvydas*. *See* Notice of Memorandum, Attorney General John Ashcroft, *Post-Order Custody Review After Zadvydas v. Davis*, 66 Fed. Reg. 38, 433 (July 24, 2001) ("Ashcroft Memorandum"). Under the procedures of the Ashcroft Memorandum, Mr. Degbe filed a written request for release from ICE custody on July 23, 2014. On December 18, 2014, Mr. Degbe learned that, on December 1, 2014, his request for release had been denied. He subsequently filed a request on July 2, 2020 (Pet. Ex. K), which ICE denied on July 20, 2020 (Pet. Ex. L).

45. Neither the Ashcroft Memorandum, nor ICE's custody review procedures outlined in 8 C.F.R. § 241.4, provide another method for obtaining or appealing ICE's custody

review decision. No statutory exhaustion requirement applies to Mr. Degbe's pending unlawful detention claim.[12]

VII. LEGAL FRAMEWORK FOR RELIEF SOUGHT

46. Courts have consistently recognized "habeas corpus as an appropriate vehicle through which noncitizens may challenge the fact of their civil immigration detention." *Vazquez Barrera v. Wolf,* 455 F. Supp. 3d 330, 336 (S.D. Tex. 2020) *(citing Zadvydas*, 533 U.S. at 688, and *Rodriguez*, 138 S. Ct. 830 (2018) (ruling on merits of habeas petition challenging validity of indefinite mandatory detention)).

47. Mr. Degbe's petition is not barred as he is not seeking to collaterally attack his final removal order. *Zadvydas*, 533 U.S. at 688 ("The aliens here, however, do not seek review of the Attorney General's exercise of discretion; rather, they challenge the extent of the Attorney General's authority under the post-removal-period detention statute. And the extent of that authority is not a matter of discretion . . . [therefore we] conclude habeas corpus proceedings remain available. . . .").

Mr. Degbe Should Be Released Because He Has Been Detained for Over Six Months and He Can Carry His Burden of Showing that Future Removal Is Unlikely.

48. Mr. Degbe is unlawfully in custody pursuant to INA § 241(a)(6), 8 U.S.C. § 1231(a)(6) (2018) ("Section 241"). Under *Zadvydas*, that provision prohibits the indefinite detention of noncitizens who **(i)** cannot be repatriated in the reasonably foreseeable future, and **(ii)** pose no threat to the community. Any such detention is unconstitutional. *See Zadvydas*, 533 U.S. at 689, *emphasis added* ("In our view, the statute [Section 241], read in light of the Constitution's demands, limits an alien's post-removal-period

[12] *See Arango Marquez v. I.N.S.*, 346 F.3d 892, 897 (9th Cir. 2003) (finding that 28 U.S.C. § 2241 "does not specifically require petitioners to exhaust direct appeals before filing petitions for habeas corpus").

detention to a period reasonably necessary to bring about that alien's removal from the United States. *It does not permit indefinite detention*.").

49. Under INA § 241(a)(1), ICE is instructed to remove noncitizens within 90 days of receiving a final order of removal. Where ICE fails to effectuate removal within the statutorily prescribed three-month period, it may only detain noncitizens for the additional period of time necessary to secure removal. *See Zadvydas*, 533 U.S. at 699-700.

50. In *Zadvydas*, the Supreme Court held that six months is the presumptively reasonable period for removal. *See id*. at 701. In the aftermath of the Supreme Court's decision, the Department of Homeland Security issued regulations governing the timelines under which detainees should be released after the statutorily prescribed period has passed.[13] Specifically, 8 C.F.R. § 241.13 explains that noncitizens may submit a written request for release "at any time after [a] removal order becomes final." ICE may detain a noncitizen for more than six months after issuance of a final removal order *only* if one of two criteria is met: **(i)** there is a "significant likelihood of removal in the reasonably foreseeable future," or **(ii)** certain narrowly defined "special circumstances" are present that justify ongoing detention. *Id.* Neither factor is met here.

51. ***First,*** since *Zadvydas* was issued, and its subsequent regulations implemented, courts have consistently released individuals who have been detained for over six months and who have carried their burden of showing that there is no significant likelihood of removal. *See, e.g.*, *Edwards v. Barr*, No. 4:20CV350-WS-MAF, 2020 WL 6747737, slip op. at 1 (N.D. Fla. Oct. 14, 2020) (ordering release of a legal permanent resident citizen of Saint-Martin Guadalupe, who was detained for longer than six months and

[13] *See* Hillel R. Smith, Cong. Research Serv., R45915, Immigration Detention: A Legal Overview 29 (2019).

who had not been deported by ICE because they had not been able to secure the necessary travel documents).

52. Due to political instability in Togo and the ongoing COVID-19 pandemic, there is no significant likelihood that Mr. Degbe will be removed in the reasonably foreseeable future. As detailed *supra,* Togo is not cooperative when it comes to deportations. ICE was not able to obtain travel documents for Mr. Degbe in 2014 and has not shown that any more recent efforts to obtain such documents have been fruitful.

53. Indeed, after detaining Mr. Degbe for nearly three years, ICE chose to release him a month after the District Court for the District of Maryland issued an order to show cause. ICE presumably released him—instead of responding to the court's order—because it could not produce any evidence that justified Mr. Degbe's indefinite detention. There is no reason to believe that ICE has any more justification now than in 2015, given that Togo has not issued any travel documents.

54. Furthermore, the fact that Mr. Degbe obtained legal residency status in the United States makes it highly unlikely that Togo will repatriate him. After all, the purpose of asylum law is to provide a form of protection when an individual's government has failed in its basic duty to safeguard his or her basic rights, and where the denial of that protection is for a discriminatory reason.[14] Federal authorities have already found that Togo denied protection for Mr. Degbe in the early 2000s. Togo has been controlled by the same family since Eyadema Gnassingbe became president through a coup in 1967 (his son, Faure Gnassingbe, took power on February 5, 2005 after his death). The country has been plagued by violence, human rights violations, and constant political

[14] *See* Atle Grahl-Madsen, *The Status of Refugees in International Law* 98-99 (1966) ("[I]t is characteristic for a refugee that his relations to the authorities of his home country have become the negation of the normal relationship between a State and its nationals (and residents).").

turmoil. (Pet. Ex. N, Togo 2019 Human Rights Report). Given that the same government from which Mr. Degbe escaped is still in power, we can at a minimum expect that Togo will not extend any support or protection for Mr. Degbe now. Moreover, it is doubtful that a government that does not cooperate with the United States would do so to help a citizen it persecuted. In sum, the particular situation of Mr. Degbe as an asylee makes removal to Togo extremely unlikely.

55. His removal becomes even more unlikely in the context of the COVID-19 pandemic. This pandemic has upended the world and has interrupted travel to many countries. This Court and others have issued releases precisely because it has become impossible to deport people to certain countries that have closed borders to the U.S. *See, e.g.*, Judgment at 1 *Balza v. Barr*, No. 6:20-CV-00866, 2020 WL 6143643 slip op. at 5 (W.D. La. Oct. 14, 2020) (releasing an individual because Venezuela was not accepting deportees from the United States due to the COVID-19 pandemic).

56. Although commercial flights from the United States to Togo continue, it is highly unlikely that a recalcitrant country would cooperate with the United States to recognize a deportee as one of its own and risk contagion from him returning to the country. This is especially so because, as explained *infra*, people in situations of confinement are much more likely to contract COVID-19 than the general population.

51. ***Second,*** under the regulations issued to conform post-order detention procedures to the *Zadvydas* decision, Mr. Degbe does not fall within any of the "special circumstance[s]" described in 8 C.F.R. § 241.14.[15] Mr. Degbe does not have a highly contagious disease; his release would not pose a serious foreign policy consequence; he is not a security threat; he does not pose any terrorist threats; and he is not "specially dangerous." The

[15] *See* Smith, Cong. Research Serv., *supra* note 13.

fact is, Mr. Degbe presents no serious danger if released. Prior to his unexpected detention, as detailed *supra,* he was a productive member of his community. Indeed, he adhered to all requirements set out in his order of supervision.

52. Mr. Degbe enjoys an extensive network of friends and family here in the United States—all are U.S. citizens who stand ready to support Mr. Degbe and help him transition back to his life outside ICE custody. Mr. Degbe will have accommodations and support from these individuals. ICE cannot show that Mr. Degbe is "specially dangerous" to the community as required under DHS regulations for continued detention beyond the six-month period contemplated by *Zadvydas*.

Because Mr. Degbe Can Carry His Burden to Show that Future Removal Is Unlikely and that None of the "Special Circumstances" Apply, He Should Be Released.

53. Mr. Degbe's final order of removal was issued on April 28, 2014. As such, his statutorily prescribed 90-day removal period ended on July 27, 2014. It follows that his six-month presumptive removal period under *Zadvydas* ended on October 28, 2014. Continued detention past this date is unlawful.

54. Moreover, there is no indication from the statute nor the regulations that the clock for effectuating removal is reset if an individual is released and then re-detained. If that were the case, then ICE could simply release and re-apprehend individuals to keep resetting the clock indefinitely while trying to carry out removal.

55. Courts have repeatedly ruled that the clock does not reset upon re-detention. *Sied v. Nielsen*, No. 17-cv-06785-LB, 2018 WL 1876907, at *6 (N.D. Cal. Apr. 19, 2018) (agreeing with "several courts" that have held that "the six-month period does not reset when the government detains an alien under 8 U.S.C. § 1231(a), releases him from detention, and then re-detains him again"); *see also Nhean v. Brott*, No. 17-28

(PAM/FLN), 2017 Wl 2437268, at *2 (D. Minn. May 2, 2017); *Bailey v. Lynch*, No. 16-2600 (JLL), 2016 WL5791497, at *2 (D.N.J. Oct. 3, 2016); *Farah v. INS*, No. Civ. 02-4725(DSD/RLE), 2003 WL 221809, at *5 (D. Minn. Jan. 29, 2013).

56. Even if Mr. Degbe's second detention had reset the clock for carrying out removal, Mr. Degbe was re-detained in February of 2020. More than eleven months later, the government has been unable to carry out removal—clearly violating the time requirements set forth in the governing statute and attendant regulations. *Zadvydas*, 533 U.S. at 699; *Clark v. Martinez*, 543 U.S. 371, 378-79 (2005); *Tran v. Mukasey*, 515 F.3d 478, 484 (5th Cir. 2008).

57. For the foregoing reasons, Mr. Degbe's continued detention is not authorized by statute or regulation and is violative of his due process rights to be free from arbitrary detention as described in *Zadvydas*. His indefinite detention is unconstitutional and he should be released immediately from ICE custody.

Separately, Mr. Degbe Should Be Released Because His Continued Detention During the COVID-19 Pandemic Violates His Substantive Due Process Right to Protection from Serious Illness and Potentially Lethal Harm.

53. Hypertension, from which Mr. Degbe suffers, is one of various Coronavirus "Risk Factors." In *Fraihat v. U.S. Immigration and Customs Enforcement*, a federal district court found that ICE's systematic response to the COVID-19 pandemic is deficient nationwide. 445 F. Supp. 3d 709, 736 (C.D. Cal. 2020), *order clarified in* No. EDCV19 – 1546 JGB (SHKx), 2020 WL 6541994 (C.D. Cal. Oct. 7, 2020) (the clarification was germane as to other issues not relevant here such as ICE's performance standards, and minimum care protocols). It therefore issued a nationwide preliminary injunction mandating that ICE take special precautions and consider release for detainees with Risk Factors. *Id.* at 751. This included reviewing all the cases of people over the age of

fifty-five, who are pregnant, or who have certain debilitating health conditions, including hypertension.[16]

54. Courts around the country have released a number of individuals who are at particular risk of having complications from contracting COVID-19. *See, e.g.*, *Vazquez Barrera* 455 F. Supp. 3d at 338–39 (S.D. Tex. 2020) ("where the court found release warranted for "Plaintiffs . . . who are at high risk of serious illness or death if they contract COVID-19, in MPC, where social distancing and proper hygiene are impossible. . . .").[17]

55. This court has previously adopted the reasoning of "numerous district courts throughout the country" that have "examine[d] cases in which immigrant detainees seek release from ICE detention because of their susceptibility to contracting COVID-19" and "examined the likelihood of success on the merits based on whether the civil confinement had become punitive and thus violated the 5th Amendment right to due process." Judgment at 2-3, *Dada v. Witte*, No. 1:20-CV-00458 (W.D. La. May 22, 2020), ECF No. 24.

56. Petitioner is in federal civil immigration detention, and his constitutional rights flow from the procedural and substantive guarantees of the Fifth Amendment. *See Koessel v.*

[16] The *Fraihat* court found that the plaintiffs were likely to succeed on their substantive due process claim due to "the month-long failure to quickly identify individuals most at risk of COVID-19 complications and to require specific protection for those individuals; and second, the failure to take measures within ICE's power to increase the distance between detainees and prevent the spread of infectious disease. . . ." *Fraihat*, 445 F. Supp. 3d at 745.

[17] *See also Jimenez v. Wolf*, No. 18-10225-MLW (D. Mass. Mar. 26, 2020) (ordering release of detained immigrant in the midst of the COVID-19 pandemic and noting that "being in a jail enhances risk" and that in jail "social distancing is difficult or impossible"); *Basank v. Decker*, No. 1:20-cv-02518-AT (S.D.N.Y. Mar. 26, 2020) (ordering the release of ten people from three immigration detention facilities in New Jersey because "confining vulnerable individuals . . . without enforcement of appropriate social distancing and without specific measures to protect their delicate health 'pose[s] an unreasonable risk of serious damage to [their] future health'") (internal citation omitted); *Thakker v. Doll*, No. 1:20-cv-00480-JEJ (M.D. Pa. Mar. 31, 2020) (ordering release of thirteen people from three immigration detention facilities in Pennsylvania because "preventative measures" against the "grave risk" of COVID-19 cannot be practiced in "tightly confined, unhygienic spaces"); *Bent v. Barr*, No. 19-cv-06123-DMR (N.D. Cal. Apr. 9, 2020) (similar); *Malam v. Adducci*, 452 F. Supp. 3d 643 (E.D. Mich. 2020), *as amended* (Apr. 6, 2020) (similar).

Sublette Cty. Sheriff's Dep't, 717 F.3d 736, 748 n.2 (10th Cir. 2013); *Ortega v. Rowe,* 796 F.2d 765, 767 (5th Cir. 1986).

57. When the government holds individuals in its custody, it assumes the "affirmative duty to protect"—an obligation to provide for their basic human needs, including medical care, reasonable safety, and protection from harm. *DeShaney v. Winnebago County Dep't of Soc. Services*, 489 U.S. 189, 200 (1989); *Koessel*, 717 F.3d 736, 748 n.2.

58. "[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Hare*, 74 F.3d at 651; *see also Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). Persons detained civilly, including in immigration detention like Mr. Degbe, are entitled to "more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." *Youngberg v. Romeo*, 457 U.S. 307, 322 (1982); *In re Kumar*, 402 F. Supp. 3d 377, 384 (W.D. Tex. 2019). A person detained civilly has due process rights that are "at least as great as the Eighth Amendment protections available to a convicted prisoner." *Hare*, 74 F.3d at 639 (citations omitted).

59. Courts have held that an immigration detainee's due process rights should be evaluated at an even higher standard than that of pretrial detainees. *In re Kumar*, 402 F. Supp. 3d at 384; *see also Jones v. Blanas*, 393 F.3d 918, 933 (9th Cir. 2004). But, at the very least, the standard applicable in the pretrial criminal detention context applies.

60. The government violates the due process rights of a person in civil detention when the conditions of his or her confinement "amount to punishment." *Garza v. City of Donna,* 922 F.3d 626, 632 (5th Cir. 2019), *cert. denied sub nom. Garza v. City of Donna, Tex.,* 140 S. Ct. 651 (2019). If "a restriction or condition is not reasonably related to a

legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees." *Bell v. Wolfish*, 441 U.S. 520, 539 (1979); *accord Hare*, 74 F.3d at 640.

61. To show that a condition of confinement amounts to punishment, the detained person need not demonstrate a government official subjectively or maliciously intends to punish; instead "intent may be inferred from the decision to expose a detainee to an unconstitutional condition." *Shepherd v. Dallas Cty.*, 591 F.3d 445, 452 (5th Cir. 2009). "[E]ven where a State may not want to subject a detainee to inhumane conditions of confinement or abusive jail practices, its intent to do so is nevertheless presumed when it incarcerates the detainee in the face of such known conditions and practices." *Hare*, 74 F.3d at 644. "A pervasive pattern of serious deficiencies" that subjects a detainee to the risk of serious injury, illness or death "amounts to [unconstitutional] punishment." *Shepherd,* 591 F.3d at 454. Such a pattern is evidenced by, for example, failing to provide adequate means to control a known risk of serious infections. *Duvall v. Dallas Cty., Tex.*, 631 F.3d 203, 208 (5th Cir. 2011).

62. In addition, it violates the Fifth Amendment's Due Process Clause for a federal official to show "deliberate indifference to a substantial risk of serious harm" to a detainee. *Doe v. Robertson,* 751 F.3d 383, 385 (5th Cir. 2014) (citing *Farmer v. Brennan,* 511 U.S. 825, 828 (1994)); *Hare*, 74 F.3d at 649. This occurs, for example, when officials "know[] of and disregard[] an excessive risk to inmate health or safety." *Robertson,* 751 F.3d at 388.

63. A detained person "does not need to show that death or serious illness has yet occurred to obtain relief," instead, they need only "show that the conditions pose a substantial risk of harm to which . . . officials have shown a deliberate indifference." *Gates v. Cook*, 376 F.3d 323, 339 (5th Cir. 2004). Federal custodians may not ignore "a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year." *Helling v. McKinney*, 509 U.S. 25, 33 (1993).

64. Specifically, housing detained persons in crowded conditions where they are at risk of infectious disease is unconstitutional, even when it "is not alleged that the likely harm would occur immediately and even though the possible infection might not affect all of those exposed." *Helling*, 509 U.S. at 33 (citing *Hutto v. Finney*, 437 U.S. 678, 682 (1978)). Nor can officials "be deliberately indifferent to the exposure of inmates to a serious, communicable disease on the ground that the complaining inmate shows no serious current symptoms." *Helling*, 509 U.S. at 33.

65. In considering similar petitions for release under *Zadvydas*, courts have recognized that "timely release is especially important now during the COVID-19 pandemic," given that "individuals housed within detention centers nonetheless remain particularly vulnerable to infections." *Ali v. Dep't of Homeland Sec.*, 451 F. Supp. 3d 703, 709–10 (S.D. Tex. 2020).

66. Defendants continue to detain Mr. Degbe despite their awareness of **(i)** the rapid spread of COVID-19, **(ii)** the importance of social distancing and sanitary practices for its prevention, **(iii)** the impossibility of protecting Mr. Degbe while in ICE detention, and **(iv)** the threat that it poses to the lives of those who, like Mr. Degbe, have certain

underlying medical conditions, including hypertension. This amounts to a punitive condition of confinement or, at the very least, deliberate indifference to a substantial risk of serious harm to Mr. Degbe—either of which suffices to show a due process violation and compels an order of release.

VIII. CLAIMS OF RELIEF SOUGHT

COUNT ONE
STATUTORY VIOLATION

67. Mr. Degbe realleges and incorporates by reference paragraphs 1 through 66 above.

68. Mr. Degbe's continued detention by the Respondents violates INA § 241(a)(6), as interpreted by *Zadvydas*. Mr. Degbe's ninety-day statutory removal period and six-month presumptively reasonable period for continued removal efforts passed long ago.

69. At this point, it is extremely unlikely that Respondents will be able to remove Mr. Degbe in the reasonably foreseeable future because of political instability in Togo and because of the ongoing COVID-19 pandemic.

70. Additionally, Togo has been categorized as a recalcitrant country by ICE. Given Togo's complete lack of cooperation with ICE to date, and recognition by the United States of Togo's unwillingness to repatriate its citizens, the United States government will not be able to remove Mr. Degbe in the foreseeable future.

71. The Supreme Court held in *Zadvydas* that the continued detention of someone like Mr. Degbe is unreasonable and unauthorized by section 241 of the INA.

COUNT TWO
SUBSTANTIVE DUE PROCESS VIOLATION

72. Mr. Degbe realleges and incorporates by reference paragraphs 1 through 66 above.

73. Mr. Degbe's continued detention violates his right to substantive due process because he is being deprived of his liberty to be free from bodily restraint. The Due Process Clause of the Fifth Amendment requires that the deprivation of Mr. Degbe's liberty be narrowly tailored to serve a compelling government interest. While the Respondents would have a compelling government interest in detaining Mr. Degbe in order to effect his deportation, that interest does not exist if Mr. Degbe cannot be deported. *Zadvydas* thus interpreted INA § 241 to allow for continued detention only when reasonably necessary to secure the noncitizen's removal. Mr. Degbe will not be removed to Togo in the absence of that country's cooperation, which, to date, has been nonexistent. Indefinite detention is unconstitutional in circumstances such as those that exist here.

COUNT THREE
PROCEDURAL DUE PROCESS VIOLATION

74. Mr. Degbe realleges and incorporates by reference paragraphs 1 through 66 above.

75. Under the Due Process Clause of the United States Constitution, a noncitizen is entitled to a timely and meaningful opportunity to demonstrate that he should not be detained. Mr. Degbe has been denied this opportunity. No administrative mechanism is in place for Mr. Degbe to secure review of his parole release request that should have been granted in light of both *Zadvydas* and *Fraihat*.

COUNT FOUR
HABEAS AUTHORITY TO ORDER RELEASE FROM UNLAWFUL DETENTION

76. Mr. Degbe realleges and incorporates by reference paragraphs 1 through 66 above.

77. The Court has broad, equitable authority under the habeas statute, 28 U.S.C. §§ 2241, 2243 and the common law, to end Mr. Degbe's unlawful detention.

78. The Court should exercise its authority to grant Mr. Degbe's habeas corpus petition and to fashion any and all additional relief, necessary to effectuate his expeditious release from unlawful detention. In the absence of such relief, Mr. Degbe is suffering, and will continue to suffer, irreparable harm.

COUNT FIVE
FEES AND COSTS

79. Petitioner requests attorney's fees and costs under 28 U.S.C. § 2412 (1976), *amended by* Equal Access to Justice Act ("EAJA"), Pub. L. No. 86-481, 94 Stat. 2325 (1980).

PRAYER FOR RELIEF

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

- Order Respondents to refrain from transferring Mr. Degbe out of the jurisdiction of Field Office Director Francisco Madrigal during the pendency of these proceedings and while Mr. Degbe remains in Respondents' custody;
- Grant Mr. Degbe a writ of habeas corpus directing the Respondents to immediately release Mr. Degbe from custody;
- Award to Mr. Degbe his reasonable costs and attorney's fees; and
- Grant any other and further relief which this Court deems just and proper.

Respectfully submitted this 29th day of January, 2021.

/s/Paul Scott

Paul Scott, Esq.
The Scott Law
paul@pwscottlaw.com
9270 Siegen Lane, Suite 104
Baton Rouge, LA 70810
(225) 341-2272
(888) 606-0123
Attorney for Petitioner Kossi Degbe

OF COUNSEL:

Nora Ahmed*
NY Bar No. 5092374
nahmed@laaclu.org
ACLU of Louisiana
P.O. Box 56157
New Orleans, LA 70156
Tel: (504) 522-0617

Pedro Gerson*
NY Bar No. 5453501
pgerson@lsu.edu
LSU Immigration Law Clinic
PO Box 80839
Baton Rouge, LA 70898
Tel: 347-574-8614

*petition for admission *pro hac vice* forthcoming

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing petition via the Court's CM/ECF filing system and via email courtesy copy to the office of the United States Attorney for the Western District of Louisiana.

Signed in Baton Rouge, Louisiana on January 29, 2021.

/s/ Paul Scott
Paul Scott