

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA**

DADA, *et al.*,

Petitioners-Plaintiffs,

v.

WITTE, *et al.*,

Respondents-Defendants.

Civil Action No.: 1:20-cv-458

Judge Dee D. Drell

Magistrate Judge Joseph H.L. Perez-Montes

ORAL ARGUMENT REQUESTED

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR
MOTION FOR A TEMPORARY RESTRAINING ORDER**

TABLE OF CONTENTS

INTRODUCTION.....1

FACTUAL BACKGROUND.....2

 I. COVID-19 Is an Unprecedented and Lethal Global Pandemic2

 II. COVID-19 is Exceedingly Dangerous for Individuals Like Plaintiffs, Who Have Underlying Health Concerns.....2

 III. Relevant ICE Detention Facilities Are Ticking Time Bombs; They Do Not, and Cannot, Meet Public Health Standards to Prevent Widespread Infections.....4

 IV. ICE’s Response to COVID-19 Is Insufficient to Prevent the Spread of This Life-Threatening Disease.....6

 V. The Consensus of Public Health Experts is That Individuals Most Vulnerable to COVID-19 Should Immediately Be Released to Protect them From Serious Illness or Death.....7

ARGUMENT.....9

 I. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF A TEMPORARY RESTRAINING ORDER.....10

 II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR DUE PROCESS CLAIMS12

 A. Plaintiffs’ Continued Detention Violates Their Due Process Right To Protection From Harm And To Be Free From Punitive Conditions12

 1. Because They Are In Civil Detention, Plaintiffs Have a Right to be Free From Punitive Conditions Of Detention in ICE Detention Facilities12

 B. Continuing Detention Constitutes Deliberate Indifference to a Substantial Risk of Serious Harm14

 C. ICE Lacks A Constitutionally Adequate Purpose For Continued Detention.....17

 D. Plaintiffs Are Likely To Prevail On Their Claim That Continued Detention Violates Procedural Due Process18

 III. THE BALANCE OF THE EQUITIES AND THE PUBLIC INTEREST TILTS SHARPLY IN FAVOR OF PLAINTIFFS’ RELEASE20

 IV. IMMEDIATE RELEASE IS THE ONLY EFFECTIVE REMEDY FOR PLAINTIFFS’ UNLAWFUL DETENTION, WHICH THE COURT HAS AMPLE AUTHORITY TO ORDER21

 V. THE COURT SHOULD NOT REQUIRE PLAINTIFFS TO PROVIDE SECURITY PRIOR TO ISSUING A TEMPORARY RESTRAINING ORDER24

CONCLUSION25

TABLE OF AUTHORITIES**Cases**

<i>Basank, et al. v. Decker, et al.</i> , No. 1:20-cv-02518-AT (S.D.N.Y. Mar. 26, 2020)	16
<i>Bell v. Wolfish</i> , 441 U.S. 520 (1979)	13
<i>Bianco v. Globus Med., Inc.</i> , No. 2:12-CV-00147-WCB, 2014 WL 1049067 (E.D. Tex. Mar. 17, 2014)	21
<i>Boumediene v. Bush</i> , 553 U.S. 723 (2008)	23
<i>Brown v. Plata</i> , 563 U.S. 493 (2011).....	22, 23
<i>Brown v. Taylor</i> , 911 F.3d 235 (5th Cir. 2018)	17
<i>Cabral v. Decker</i> , 331 F. Supp. 3d 255 (S.D.N.Y. 2018).....	24
<i>Calderon v. Cronen</i> , No. 18-10225 (MLW) (D. Mass. Mar. 26, 2020)	16
<i>Castillo v. Barr</i> , No. CV 20-00605 TJH (AFMx) (C.D. Cal. Mar. 27, 2020)	12
<i>Chambers v. Coventry Health Care of Louisiana, Inc.</i> , 318 F. Supp. 2d 382 (E.D. La. 2004)....	11
<i>Cohen v. Coahoma Co.</i> , 805 F. Supp. 398 (N.D. Miss. 1992)	21
<i>Cole v. Livingston</i> , No. 4:14-CV-1698, 2016 U.S. Dist. LEXIS 80345 (S.D. Tex. June 21, 2016)	25
<i>Cooper v. Oklahoma</i> , 517 U.S. 348 (1996)	18
<i>Corrigan Dispatch Company v. Casa Guzman</i> , 569 F.2d 300 (5th Cir. 1978)	25
<i>Coronel, et al. v. Decker</i> , No. 1:20-cv-02472-AJN (S.D.N.Y. Mar. 27, 2020).....	16, 20
<i>Daniels Health Scis., L.L.C. v. Vascular Health Scis., L.L.C.</i> , 710 F.3d 579 (5th Cir. 2013).....	11
<i>Demore v. Kim</i> , 538 U.S. 510 (2003)	18, 19
<i>DeShaney v. Winnebago Cty. Dep't of Soc. Servs.</i> , 489 U.S. 189 (1989).....	12
<i>DSC Commc'ns Corp. v. DGI Techs., Inc.</i> , 81 F.3d 597 (5th Cir. 1996)	11
<i>Duran v. Elrod</i> , 713 F.2d 292 (7th Cir. 1983).....	23
<i>Duvall v. Dallas Cty., Tex.</i> , 631 F.3d 203 (5th Cir. 2011).....	14
<i>Edwards v. Johnson</i> , 209 F.3d 772 (5th Cir. 2000)	13
<i>El Paso Cty., Texas v. Trump</i> , 407 F. Supp. 3d 655 (W.D. Tex. 2019).....	21
<i>Farmer v. Brennan</i> , 511 U.S. 825 (1994)	15
<i>Flores v. Barr</i> , No. CV 85-4544-DMG (AGRx) (C.D. Cal. Mar. 28, 2020).....	21
<i>Foucha v. Louisiana</i> , 504 U.S. 71 (1992).....	13, 18
<i>Fraihat v. Wolf, et al.</i> , No. ED CV 20-00590 TJH (KSx) (C.D. Cal. Mar 30, 2020).....	16
<i>Gates v. Collier</i> , 501 F.2d 1291 (5th Cir. 1974).....	15
<i>Gates v. Cook</i> , 376 F.3d 323 (5th Cir. 2004).....	15
<i>Grand River Enterprises Six Nations, Ltd. v. Pryor</i> , 425 F.3d 158 (2d Cir. 2005)	21
<i>Hare v. City of Corinth, Miss.</i> , 135 F.3d 320 (5th Cir. 1998).....	12, 13, 15
<i>Harris v. Hegmann</i> , 198 F.3d 153 (5th Cir. 1999)	16
<i>Harris v. Nelson</i> , 394 U.S. 286 (1969)	22, 23
<i>Helling v. McKinney</i> , 509 U.S. 25 (1993).....	2, 15
<i>Hernandez v. Sessions</i> , 872 F.3d 976 (9th Cir. 2017).....	18, 22
<i>Hilton v. Braunskill</i> , 481 U.S. 770 (1987)	23
<i>In re Bahadur</i> , No. EP-19-CV-00357-DCG, 2020 U.S. Dist. LEXIS 33455 (W.D. Tex. Feb. 27, 2020)	11
<i>In re Guerra</i> , 24 I. & N. Dec. 37 (BIA 2006).....	20
<i>In re Kumar</i> , 402 F. Supp. 3d 377 (W.D. Tex. 2019).....	13
<i>In the Matter of the Request to Commute or Suspend County Jail Sentences</i> , Case No. 84230 (N.J. Mar. 22, 2020).....	16

<i>Ingebretsen v. Jackson Pub. Sch. Dist.</i> , 88 F.3d 274 (5th Cir. 1996).....	21
<i>Jackson v. Indiana</i> , 406 U.S. 715 (1972).....	17
<i>Jolly v. Coughlin</i> , 76 F.3d 468 (2d Cir. 1996).....	11
<i>Jones v. Blanas</i> , 393 F.3d 918 (9th Cir. 2004).....	13
<i>Jones v. Texas Dep't of Criminal Justice</i> , 880 F.3d 756 (5th Cir. 2018).....	15
<i>Jones v. United States</i> , 463 U.S. 354 (1983).....	17
<i>Kaepa, Inc. v. Achilles Corp.</i> , 76 F.3d 624 (5th Cir. 1996).....	25
<i>Kansas v. Hendricks</i> , 521 U.S. 346 (1997).....	18
<i>Lake Charles Diesel, Inc. v. General Motors Corp.</i> , 328 F.3d 192 (5th Cir. 2003).....	10
<i>Leslie v. Holder</i> , 865 F. Supp. 2d 627 (M.D. Pa. 2012).....	24
<i>Mapp v. Reno</i> , 241 F.3d 221 (2d Cir. 2001).....	24
<i>M.R. v. Dreyfus</i> , 697 F.3d 706 (9th Cir. 2012).....	11
<i>Malam v. Adducci, et al.</i> , No. 2:20-cv-10829-JEL-APP (E.D. Mich. Apr. 5, 2020).....	23
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976).....	19, 20
<i>Matter of Extradition of Toledo Manrique</i> , No. 19MJ71055MAG1TSH, 2020 WL 1307109 (N.D. Cal. Mar. 19, 2020).....	7, 16, 24
<i>Mobile Cty. Jail Inmates v. Purvis</i> , 581 F. Supp. 222 (S.D. Ala. 1984).....	24
<i>Monumental Task Comm., Inc. v. Foxx</i> , 157 F. Supp. 3d 573 (E.D. La. 2016).....	11
<i>Nken v. Holder</i> , 556 U.S. 418 (2009).....	21
<i>O'Connor v. Donaldson</i> , 422 U.S. 563 (1975).....	17
<i>Opulent Life Church v. City of Holly Springs, Miss.</i> , 697 F.3d 279 (5th Cir. 2012).....	12
<i>Orantes-Hernandez v. Smith</i> , 541 F. Supp. 351 (C.D. Cal. 1982).....	25
<i>Pashby v. Delia</i> , 709 F.3d 307 (4th Cir. 2013).....	21
<i>Pierre v. United States</i> , 525 F.2d 933 (5th Cir. 1976).....	23
<i>Planned Parenthood of Gulf Coast, Inc. v. Gee</i> , 862 F.3d 445 (5th Cir. 2017).....	21
<i>Poree v. Collins</i> , 866 F.3d 235 (5th Cir. 2017).....	22, 23
<i>Reno v. Flores</i> , 507 U.S. 292 (1993).....	20
<i>Sanchez v. Winfrey</i> , No. CIV.A.SA04CA0293RFNN, 2004 WL 1118718 (W.D. Tex. Apr. 28, 2004).....	24
<i>Shepherd v. Dallas Cty.</i> , 591 F.3d 445 (5th Cir. 2009).....	13, 14
<i>Thakker, et al. v. Doll, et al.</i> , No 1:20-cv-00480-JEJ (M.D. Pa. Mar. 31, 2020).....	16
<i>U.S. v. Barkman</i> , No. 3:19-cr-0052-RCJ-WGC, 2020 U.S. Dist. LEXIS 45628 (D. Nev. Mar. 17, 2020).....	21
<i>Umana Jovel v. Thomas Decker, et al.</i> , No. 1:20-cv-00308-GBD-SN (S.D.N.Y. Mar. 24, 2020)	16, 20
<i>United States v. Martin</i> , No. 19 Cr. 140-13, 2020 WL 1274857 (D. Md. Mar. 17, 2020).....	16
<i>United States v. Raihan</i> , No. 20-cr-68-BMC- JO (E.D.N.Y. Mar. 12, 2020).....	24
<i>United States v. Stephens</i> , No. 15-cr-95 (AJN), 2020 U.S. Dist. LEXIS 47846 (S.D.N.Y. Mar. 18, 2020).....	24
<i>Unknown Parties v. Johnson</i> , No. CV-15-00250-TUC (DCBx), 2016 WL 8188563 (D. Ariz. No. 18, 2016).....	11
<i>Washington v. Glucksberg</i> , 521 U.S. 702 (1997).....	18
<i>Wilwording v. Swenson</i> , 404 U.S. 249 (1971).....	23
<i>Xochihua-Jaimes v. Barr</i> , No. 18-71460 (9th Cir. Mar. 23, 2020).....	16, 24
<i>Youngberg v. Romeo</i> , 457 U.S. 307 (1982).....	13
<i>Zadvydas v. Davis</i> , 533 U.S. 678 (2001).....	18, 19, 20

Statutes

28 U.S.C. § 2241 10, 22
28 U.S.C. § 2243 22, 23
42 U.S.C. § 1983 22

Rules

Federal Rule of Civil Procedure 65 22, 23, 24

INTRODUCTION

Today's global pandemic of the COVID-19 virus is the worst the world has seen since 1918. Public health experts have admonished that the only effective way to reduce the risk of severe illness or death for vulnerable individuals is sustained social distancing and vigilant hygiene. Such measures are impossible to achieve in crowded detention centers. For this reason, health care professionals – including two of the Department of Homeland Security's own medical experts – have urgently called for the release of detained immigrants, particularly elderly or medically vulnerable ones.¹ Yet, Respondent-Defendants ("Defendants") continue to detain thousands of individuals in Louisiana facilities and across the country, including those at severe risk of serious illness or death, despite the ready availability of release, including under community-based alternatives to detention.

Petitioner-Plaintiffs ("Plaintiffs") are sixteen individuals detained in Louisiana and who, due to their age and pre-existing medical conditions, are particularly vulnerable to serious illness or death if infected by COVID-19. While detained, it will be impossible to engage in necessary social distancing practices to protect themselves and others; they are vulnerable to infection because they eat, sleep and otherwise congregate in tight proximity to others and because sanitary conditions in these facilities is poor, lacking sufficient, basic supplies of soap and hand sanitizer.

Even with the measures ICE is attempting so as to limit the spread of COVID-19, immigration detention centers are a hotbed for spread of the virus, which broadly endangers public health and will strain vulnerable hospital systems. For at-risk individuals like Plaintiffs, protection from the virus is a matter of life or death. The danger posed by Plaintiffs' continued detention during the COVID-19 pandemic is "so grave that it violates contemporary standards of decency to

¹ Catherine E. Shoichet, *Doctors Warn of 'Tinderbox Scenario' if Coronavirus Spreads in ICE Detention*, CNN, Mar. 20, 2020, available at <https://www.cnn.com/2020/03/20/health/doctors-ice-detention-coronavirus/index.html>.

expose anyone unwillingly to such a risk” and violates their constitutional right to safety in government custody. *Helling v. McKinney*, 509 U.S. 25, 36 (1993). Without this Court’s intervention, Plaintiffs will continue to face the imminent risk of severe illness or death. Release – which this Court, like many others who have already acted, is fully authorized to order – is the only meaningful way to protect Plaintiffs from grave, irreparable harm.

FACTUAL BACKGROUND

I. COVID-19 Is an Unprecedented and Lethal Global Pandemic.

COVID-19 is a highly contagious disease that is easily transmitted through respiratory droplets, especially when one is within six feet of an infected individual. Meyer Decl. ¶20. It can result in severe and widespread damage to lungs, heart, liver, or other organs. In many cases, COVID-19 results in death. *Id.* ¶21. A patient’s condition can seriously deteriorate within days.²

Those who develop serious complications will need advanced medical support. *Id.* ¶22. This level of support is especially difficult to provide for detained individuals. *See id.* ¶¶16, 32-33. The need for advanced medical care and the likelihood of death are much greater from COVID-19 infection than from influenza. *See Id.* ¶19.

There is no vaccine against COVID-19, nor any known medication to prevent or treat infection from the virus. *Id.* ¶ 19. The only effective measure to reduce the risk of infection and thus severe illness or death to vulnerable individuals is to enforce regular social distancing (remaining physically separated from known or potentially infected individuals) and vigilant hygiene, including frequently washing hands with soap and water. *See Id.* ¶¶9-12.

II. COVID-19 is Exceedingly Dangerous for Individuals Like Plaintiffs, Who Have Underlying Health Concerns.

² Centers for Disease Control and Prevention, “Clinical Presentation” *Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19)* (Mar. 31, 2020) available at <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html>.

Older individuals and those with certain medical conditions face greater chances of serious illness or death from COVID-19. *Id.* ¶¶ 21. Certain underlying medical conditions increase the risk of serious COVID-19 disease for individuals of any age, including but not limited to lung disease, chronic liver or kidney disease, diabetes, epilepsy, hypertension, compromised immune systems, blood disorders, inherited metabolic disorders, stroke, and pregnancy. *Id.*; Bazzano Decl. ¶8. Individuals detained in immigration detention centers, including those in the New Orleans Field Office area of responsibility, are also more susceptible to experiencing complications from infectious diseases than the population at large. Meyer Decl. ¶14. This is especially true for the following Plaintiffs, with underlying conditions such as diabetes, lung disease, kidney disease, or other illness. *Id.* ¶13.

- **Tatalu Helen Dada** suffers from asthma, Grave's Disease, hypothyroidism, hypertension, malnutrition, and vision loss, and has been hospitalized numerous times due to her rapidly deteriorating health all putting her at a high risk of severe complications or death if she contracts COVID-19. Bazzano Decl. ¶b. She has a place to live if released. Compl. ¶ 22.
- **Matilde Flores de Saavedra** is 78 and suffers from uncontrolled diabetes and hypertension which puts her at high risk of severe illness or death if she contracts COVID-19. Bazzano Decl. ¶d. She has a place to live if released. Compl. ¶23.
- **Sirous Asgari** is 59 years old, and suffers from chronic lung conditions, hypertension, and liver disease. His medical conditions put him at high risk of severe illness or death if he contracts COVID-19. Bazzano Decl. ¶i. He has a place to live if released. Compl. ¶24.
- **Suresh Kumar** suffers from Hepatitis C, malnutrition, and chronic pain, and is immunocompromised. His medical conditions put him at high risk of severe illness or death if he contracts COVID-19. Bazzano Decl. ¶e. He has a place to live if released. Compl. ¶30.
- **Pardeep Kumar** suffers from malnutrition, is immunocompromised, and has failing kidneys. These medical conditions put him at high risk of severe illness or death if he contracts COVID-19. Bazzano Decl. ¶f. He has a place to live if released. Compl. ¶31.
- **Rosabel Carrera** is 59 years old and suffers from diabetes. She also has a history of stroke and suffers from heart disease, hypertension, arthritis, and vision loss. She is at high risk of severe illness or death if she contracts COVID-19. Bazzano Decl. ¶a. She has a place to live if released. Compl. ¶26.

- **Sonia Lemus Tejada Dejaso** suffers from heart disease and hypertension, putting her at a high risk of severe illness or death if she contracts COVID-19. Bazzano Decl. ¶c. She has a place to live if released. Compl. ¶27.
- **Griselda Del Bosque** is 59 years old and suffers from severe asthma putting her at high risk of severe illness or death if she contracts COVID-19. Bazzano Decl. ¶h She has a place to live if released. Compl. ¶28.
- **Nadira Sampath Grant** suffers from diabetes and diabetic related complications such as neuropathy and issues with her kidneys putting her at high risk of severe illness or death if she contracts COVID-19. Bazzano Decl. ¶g. She has a place to live if released. Compl. ¶29.
- **Abraham Gebremedhin Gebremichael** suffers from bradycardia, a heart condition that leaves his body without sufficient oxygen, which puts him at high risk of severe illness or death if he contracts COVID-19. Bazzano Decl. ¶o. He has a place to live if released. Compl. ¶32.
- **Hasan Saleh** suffers from hypertension, diabetes, high cholesterol and blood clots, and is 62 years old. His age and medical conditions put him at high risk of severe illness or death if he contracts COVID-19. Bazzano Decl. ¶j. He has a place to live if released. Compl. ¶35.
- **Rolando Alex Colon** suffers from hypertension and high cholesterol, putting him at high risk of severe illness or death if he contracts COVID-19. Bazzano Decl. ¶k. He has a place to live if released. Compl. ¶33.
- **Karthikeyan Ponnusamy** suffers from hypertension, diabetes, and Low Lactate Dehydrogenase, putting him at high risk of severe illness or death if he contracts COVID-19. Bazzano Decl. ¶p. He has a place to live if released. Compl. ¶34.
- **Aracelio Rodriguez** suffers from severe asthma, putting him at high risk of severe illness or death if he contracts COVID-19. Bazzano Decl. ¶n. He has a place to live if released. Compl. ¶36.
- **Desmond Nkobenei** suffers from hypertension, putting him at high risk of severe illness or death if he contracts COVID-19. Bazzano Decl. ¶m. He has a place to live if released. Compl. ¶37.
- **Eduardo Devora Espinosa** suffers from hypertension and diabetes, putting him at high risk of severe illness or death if he contracts COVID-19. Bazzano Decl. ¶l. He has a place to live if released. Compl. ¶25.

III. Relevant ICE Detention Facilities Are Ticking Time Bombs; They Do Not, and Cannot, Meet Public Health Standards to Prevent Widespread Infections.

The LaSalle, Winn, Jackson, Catahoula, Pine Prairie, and Richwood facilities are located in Louisiana.³ As of April 13, 2020, there were nearly 21,100 COVID-19 cases in Louisiana, and over 880 deaths.⁴ These data include cases in all of the parishes in which these facilities are located.

Detention centers present a particularly high risk of outbreaks, which is exemplified by the skyrocketing numbers of cases in New York City jails. Meyer Decl. ¶¶7-17. The only effective way to prevent infection is to practice proper hygiene and, crucially, social distancing: maintaining a distance of at least six feet between oneself and others. *Id.* ¶¶11, 20. But several Plaintiffs describe conditions in these facilities that render it impossible to practice social distancing: many sleep in dorms that they share with over 50 other individuals, in beds—sometimes double- or triple-bunk beds—that are well under six feet apart, in some cases less than two feet apart (Dada Decl. ¶¶15-16; del Bosque Decl. ¶8; Flores de Saavedra ¶5; Carrera Decl. ¶10; Asgari Decl. ¶18; Sampath Grant Decl. ¶6; Nkobenei Decl. ¶ 4; Rodriguez Decl. ¶13; Gebremichael Decl. ¶10; ; Obser Decl. ¶¶13-15; Ponnusamy Decl. ¶10). They share bathrooms and dining halls (*Id.*), and in one case forty-four men share one shower. Asgari Decl. ¶18. To make matters worse, Defendants have not adopted adequate mitigation measures: the staff at detention centers do not wear masks or gloves (Dada Decl. ¶¶15-16; del Bosque Decl. ¶5; Flores de Saavedra Decl. ¶7; Carrera Decl. ¶11; Suresh Kumar Decl. ¶8; Sampath Grant Decl. ¶5; Saleh Decl. ¶6), and Plaintiffs do not have adequate access to soap or hand sanitizer (Sampath Grant Decl. ¶5; del Bosque Decl. ¶7; Dada Decl. ¶16; Gebremichael Decl. ¶11; Rodriguez Decl. ¶17; Tejada Dejaso Decl. ¶9; Ponnusamy Decl. ¶9). Richwood, in particular, even prohibits staff from wearing personal protective equipment. Nochomovitz Decl. ¶16. Plaintiffs also describe instances where individuals

³ Detention Facility Locator, U.S. Immigration and Customs Enforcement, *available at* <https://www.ice.gov/detention-facilities>.

⁴ Louisiana Department of Health, *Coronavirus (COVID-19)* (Apr. 13, 2020), <http://ldh.la.gov/coronavirus/>.

who are ill – including those presenting symptoms consistent with COVID-19 – are not tested or given adequate medical care. Sampath Grant Decl. ¶ 7; del Bosque Decl. ¶ 9; Dada Decl. ¶ 15; Gebremichael Decl. ¶12.

COVID-19 has already reached at least some of the immigration detention centers in Louisiana. Huber Decl. ¶10. Dorms at Pine Prairie, Winn, and Basile are currently under indefinite quarantine. *Id.* Pine Prairie has two confirmed COVID-19 cases, and both Winn and Richwood each have one as well. At least 11 staff members and 6 detained persons have so far tested positive for COVID-19 at Louisiana ICE facilities.⁵ There is an immediate and impending threat that COVID-19 will become widespread in these detention centers. In fact, in the absence of widespread testing, there is no way to be certain that infection is not already present across other facilities. Once one person in a detention facility contracts the virus, it spreads quickly because individuals in detention centers live, sleep, eat, and use the bathroom in close proximity with others, which “make it difficult if not impossible to contain transmission.” Bazzano Decl. ¶14. And, given the daily entry of staff and guards from the community, and the continued influx and transfer of dozens of new people into detention facilities on a daily or weekly basis, *see, e.g.*, Asgari Decl. ¶¶ 13, 17; Sampath Grant Decl. ¶7; del Bosque Decl. ¶9; Nkobenei Decl. ¶7; Nochomovitz Decl. ¶14, it is only a short matter of time before the disease becomes widespread throughout all of these detention centers.

IV. ICE’s Response to COVID-19 Is Insufficient to Prevent the Spread of This Life-Threatening Disease.

As these conditions show, Defendants have not and cannot ensure mitigation of COVID-19 in ICE detention facilities. Bazzano Decl. ¶15. While ICE policy is to test and isolate those who are at high epidemiologic risk, this is insufficient: not everyone who contracts the virus is

⁵ ICE COVID-19 Guidance, <https://www.ice.gov/coronavirus> (Apr. 13, 2020).

symptomatic, and few detention centers have negative pressure rooms, which are required to prevent spread of the virus from the isolated individual's room to others. Meyer Decl. ¶14; *Matter of Extradition of Toledo Manrique*, No. 19MJ71055MAG1TSH, 2020 WL 1307109, at *1 (N.D. Cal. Mar. 19, 2020) (“symptoms of COVID-19 can begin to appear 2-14 days after exposure, so screening people based on observable symptoms is just a game of catch up”).

Further, although ICE has temporarily suspended social visitation in all detention facilities, staff, contractors, and vendors continue to arrive and leave the detention centers.⁶ Meyer Decl. ¶ 8. Detained individuals are also frequently transported to, from, and between facilities. *Id.* Given the general lack of available testing, it is impossible for detention facilities to consistently and adequately screen detained persons and staff for new, asymptomatic infection. *Id.* ¶30. Anything short of aggressive screening and testing of detained individuals, staff, officials and other care and service providers who enter the facility is insufficient to prevent infection. Neither ICE nor the Louisiana detention facilities have the resources necessary to engage in such an effort. *Id.* ¶¶25-30; Bazzano Decl. ¶ 15.

Importantly, the COVID-19 pandemic—and ICE's unsatisfactory response to it—will significantly strain ICE's already broken medical care system, while the medical system in surrounding areas is expected to soon be overloaded, significantly reducing the capacity to provide emergency, life-saving medical care to all. Bazzano Decl. ¶¶ 7-9. Long before the COVID-19 outbreak, numerous reports (including by DHS itself) have identified serious and substantial flaws in ICE's medical care system. Compl. ¶¶138-42.

V. The Consensus of Public Health Experts is That Individuals Most Vulnerable to COVID-19 Should Immediately Be Released to Protect them From Serious Illness or Death.

⁶ *ICE Guidance on COVID-19*, U.S. Immigration and Customs Enforcement, *available at* <https://www.ice.gov/covid19>.

Public health experts with experience in immigration detention have recommended the release of vulnerable individuals. Two DHS medical experts sent a letter to Congress warning of the severe public health risks of keeping individuals detained and recommending release of most persons in immigration detention.⁷ A former Acting Director of ICE has stated that ICE “can, and must, reduce the risk [COVID-19] poses to so many people, and the most effective way to do so is to drastically reduce the number of people it is currently holding.”¹²

Releasing the most vulnerable people, such as Plaintiffs, would also reduce the burden on regional hospitals and health centers. Meyer Decl. ¶¶16, 35-37. In case of an outbreak at a detention center, those institutions would bear the brunt of having to treat infected individuals from detention centers and would have fewer medical resources available for the general population. *Id.* ¶16. Governments worldwide have recognized the threat posed by the spread of COVID-19 among detained and incarcerated populations and have released detained persons in response. For example, Iran temporarily released more than 70,000 people to curb the spread of the virus. *Id.* ¶24. In the United States, several jurisdictions including Los Angeles, New York, and Chicago have also released detained individuals for the same reasons, as has New Orleans. Compl. ¶154. On March 22, the New Jersey Supreme Court issued a consent order for the presumptive release of approximately 1,000 persons by March 26. And on April 2, 2020, the Chief Justice of the Louisiana Supreme Court offered guidance on reducing the jail population, encouraging district court judges to release detained persons because a coronavirus outbreak in jails and prisons would be “catastrophic for jail staff, the families of jail staff, and inmates.”⁸

⁷ Letter from Dr. Scott Allen and Dr. Josiah Rich, to House Comm. on Homeland Sec., Mar. 19, 2020, *available at* <https://www.documentcloud.org/documents/6816336-032020-Letter-From-Drs-Allen-Rich-to-Congress-Re.html#document/p4/a557238>; Catherine Shoichet, *Doctors Warn of “Tinderbox Scenario” If Coronavirus Spreads in ICE Detention*, CNN.com, Mar. 20, 2020, *available at* <https://www.cnn.com/2020/03/20/health/doctors-ice-detention-coronavirus/index.html>.

⁸ Chief Justice Bernette Joshua Johnson, Letter To the Louisiana District Judges, April 2, 2020, *available at* <https://www.lasc.org/COVID19/2020-04-02-LASC-ChiefLetterReCOVID-19andjailpopulation.pdf>; *see also* Javonti

Dr. Meyer has concluded that “[r]educing the size of the population in jails and prisons can be crucially important to reducing the level or risk both for those within those facilities and for the community at large. Meyer Decl. ¶35. Dr. Meyer recommends “that individuals who are already in [ICE facilities] be evaluated for release,” and that “[t]his is more important still for individuals with preexisting conditions... or who are over the age of 65.” *Id.* ¶¶ 35-36. In light of Plaintiffs’ medical conditions, Dr. Bazzano has determined that Plaintiffs face a substantial risk of severe illness or death as a result of continued detention. Bazzano Decl. ¶¶ a-p.

ARGUMENT

Under Rule 65 of the Federal Rules of Civil Procedure, a movant is entitled to temporary restraining order to preserve the status quo—here, the health and lives of Plaintiffs—by showing: (1) a substantial likelihood of success on the merits of their claims for relief; (2) a substantial threat of irreparable injury absent the injunction; (3) that the threatened injury outweighs any damage that injunction may cause the opposing party; and (4) that the injunction will not disserve public interest. *Lake Charles Diesel, Inc. v. General Motors Corp*, 328 F.3d 192, 195 (5th Cir. 2003). The Court likewise has wholly independent authority under habeas corpus, 28 U.S.C. § 2241, to order immediate release from unconstitutional confinement.

There is voluminous evidence in the record showing that Plaintiffs are particularly vulnerable to severe illness and death, through highly likely exposure to the surging COVID-19 virus. The evidence demonstrating the serious risk they face to their health, including a risk of death, constitutes the clearest form of irreparable harm that the law recognizes. In contrast, Defendants can identify no sufficiently countervailing interest in continuing to subject those in

Thomas, *Louisiana Chief Justice calls for reduced jail populations to combat COVID-19 outbreak*, KALB, April 3, 2020, available at <https://www.kalb.com/content/news/Louisiana-Chief-Justice-calls-for-reduced-jail-populations-to-avoid-COVID-19-outbreak--569348241.html>

civil immigration detention to such a grave health risk. In the last two weeks, dozens of courts have recognized as much and ordered detained persons released. Because subjecting persons in civil immigration detention to such dangerous conditions of confinement is punitive as well as recklessly indifferent to the known risks Plaintiffs face, and because continued detention in the face of such risks serves no legitimate nonpunitive government interest, Plaintiffs are likely to succeed on the merits of their substantive due process claims. And, because Plaintiffs face severe practical limitations on counsel access and procedures such as a bond hearing to vindicate their fundamental right to be free from unjustified detention, they are likely to succeed on their procedural due process claim.

Detaining these vulnerable individuals for civil immigration purposes contrary to expert consensus that they face substantial risk of illness or death represents the height of arbitrary detention and compels judicial intervention. Plaintiffs' lives are at stake.

I. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF A TEMPORARY RESTRAINING ORDER

“Perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered.” *Monumental Task Comm., Inc. v. Foxx*, 157 F. Supp. 3d 573, 582–83 (E.D. La. 2016), *aff'd sub nom. Monumental Task Comm., Inc. v. Chao*, 678 F. App'x 250 (5th Cir. 2017) (quotations omitted). The Fifth Circuit requires only a “substantial threat” of irreparable injury, *DSC Commc'ns Corp. v. DGI Techs., Inc.*, 81 F.3d 597, 600 (5th Cir.1996), which is defined as “harm for which there is no adequate remedy at law,” such as monetary damages. *Daniels Health Scis., L.L.C. v. Vascular Health Scis., L.L.C.*, 710 F.3d 579, 585 (5th Cir. 2013).

Without emergency relief from this Court, Plaintiffs face a substantial threat of imminent and irreparable injury, including death—harms no court can otherwise remediate. *See In re Bahadur*, No. EP-19-CV-00357-DCG, 2020 U.S. Dist. LEXIS 33455, at *14 (W.D. Tex. Feb. 27, 2020); *Chambers v. Coventry Health Care of Louisiana, Inc.*, 318 F. Supp. 2d 382 (E.D. La. 2004) (irreparable harm found where late detection of cancer could lead to death). Short of death, Plaintiffs are at grave risk of contracting severe and potentially lifelong medical conditions, which also establishes irreparable harm. *See, e.g., M.R. v. Dreyfus*, 697 F.3d 706, 729 (9th Cir. 2012); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996); *see also Unknown Parties v. Johnson*, No. CV-15-00250-TUC (DCBx), 2016 WL 8188563, at *15 (D. Ariz. No. 18, 2016), *aff'd sub nom Doe v. Kelly*, 878 F.3d 710 (9th Cir. 2017) (irreparable harm where evidence demonstrated “medical risks associated with . . . being exposed to communicable diseases”).

Given their age and medical vulnerabilities, even those Plaintiffs who survive COVID-19 are likely to suffer lifelong ailments including neurologic damage and the loss of respiratory capacity, and may require extensive rehabilitation or profound reconditioning. And, short of release, there are no sufficient measures—preventative or palliative—that Defendants can implement to protect Plaintiffs, from crowded, unsanitary conditions. Bazzano Decl. ¶¶16-18. Medical experts conclude that COVID-19 poses unprecedented threats to the safety of these individuals—and those who come in contact with them, including ICE staff, healthcare providers, and local populations—and must be released. Meyer Decl. ¶¶35-37; Bazzano Decl. ¶¶16-18.

Plaintiffs can also demonstrate irreparable harm through a showing, *see infra* Section II, that Defendants have violated their constitutional rights. *See Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 295 (5th Cir. 2012); *Castillo v. Barr*, CV 20-00605 TJH (AFMx), ECF No. 32, at 9 (C.D. Cal. Mar. 27, 2020) (concluding that “[a] civil detainee’s constitutional

rights are violated if a condition of his confinement places him at substantial risk of suffering serious harm, such as the harm caused by a pandemic”).

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR DUE PROCESS CLAIMS

A. Plaintiffs’ Continued Detention Violates Their Due Process Right To Protection From Harm And To Be Free From Punitive Conditions.

When the State holds individuals in its custody, the Constitution imposes an obligation to provide for their basic human needs, including medical care and reasonable safety. *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 199–200 (1989).

The rationale for this principle is simple enough: when the State 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—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.

Id. (citations omitted); *accord Hare v. City of Corinth, Miss.*, 135 F.3d 320, 326 (5th Cir. 1998).

1. Because They Are In Civil Detention, Plaintiffs Have a Right to be Free From Punitive Conditions Of Detention in ICE Detention Facilities.

A person in civil immigration detention has due process rights that are, at a minimum, similar to those of a person detained in pretrial detention prior to an adjudication of guilt, *Edwards v. Johnson*, 209 F.3d 772, 778 (5th Cir. 2000).⁹ At a minimum, due process mandates that those in civil detention not be punished. *Hare*, 74 F.3d at 639. *See also Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). Where the Eighth Amendment protects individuals in prison from punishment that rises

⁹ Some courts have held that individuals in immigration detention have greater protections than those in pretrial detention because they rarely implicate penological interests associated with criminal confinement or suspicion. *In re Kumar*, 402 F. Supp. 3d 377, 384 (W.D. Tex. 2019); *Jones v. Blanas*, 393 F.3d 918, 933 (9th Cir. 2004). The *Kumar* court applied the *Youngberg* civil commitment standard to the immigration detention context, which asks whether “defendants’ conduct was ‘such a substantial departure from accepted professional judgment, practice, or standards in the care and treatment of this plaintiff.’” *Youngberg v. Romeo*, 457 U.S. 307, 314 (1982). There can be *no* professional medical or penological judgment that could reasonably support the continued detention of elderly and/or medically compromised individuals in immigration detention in crowded, precarious conditions that subject them to a certain risk of contagion, illness or death.

to “cruel and unusual,” the Due Process Clause protects individuals in detention from *any* punishment. Therefore, persons in civil immigration detention are entitled to “more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.” *Youngberg*, 457 U.S. at 322.

A condition of detention amounts to impermissible punishment when “it is not reasonably related to a legitimate goal,” if it is “excessive” in relation to a legitimate goal,” or if it is otherwise “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); *Hare*, 74 F.3d at 640. To make this showing, an individual in detention need not demonstrate the defendant’s subjective or malicious intent to punish. *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 an individual in detention to the risk of serious injury or death likewise amounts to punishment. *Shepherd*, 591 F.3d at 454.

In *Shepherd*, the Fifth Circuit found that a “jail’s evaluation, monitoring, and treatment of inmates with chronic illness was [...] grossly inadequate due to poor or non-existent procedures and understaffing of guards and medical personnel,” that “serious injury and death were the inevitable results of the jail’s gross inattention to the needs of inmates with chronic illness,” and that this amounted to punishment. *Shepherd.*, 591 F.3d at 454. Similarly, in *Duvall*, the Fifth Circuit affirmed a jury’s finding that Dallas County had an unconstitutionally punitive custom or policy when it allowed infections of Methicillin-Resistant *Staphylococcus Aureus* (MRSA) to be

present in a jail, and failed to take necessary measures for eradication. *Duvall v. Dallas Cty., Tex.*, 631 F.3d 203, 208-209 (5th Cir. 2011).

Given the cramped, unsanitary, and irremediable conditions in ICE detention facilities, Plaintiffs face a demonstrably substantial risk of contracting COVID-19. Once they are exposed, they are all vulnerable to severe illness or death, either because of their age, or because they have underlying medical conditions, including: asthma, heart disease, compromised immune system, chronic renal issues, liver disease, susceptibility to lung disease, and diabetes. Continued detention of Plaintiffs is an imminent threat to their lives that is clearly excessive in relation to any purported government goal, and therefore amounts to punishment.

B. Continuing Detention Constitutes Deliberate Indifference to a Substantial Risk of Serious Harm.

In addition to affirmatively imposing punitive conditions of confinement, *supra* Section II(A)(2), an official violates the Due Process Clause if the official has “acted or failed to act with deliberate indifference to the detainee's needs.” *Hare*, 74 F.3d at 648.¹⁰ Courts find deliberate indifference when a detained person can show: (1) “that he is incarcerated under conditions posing a substantial risk of serious harm,” and (2) “that the official was deliberately indifferent to inmate health or safety.” *Hare*, 74 F.3d at 648 (citing *Farmer v. Brennan*, 511 U.S. 825 (1994)). Under the second prong, the Fifth Circuit asks whether the official “knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.” *Jones v. Texas Dep't of Criminal Justice*, 880 F.3d 756, 759 (5th Cir. 2018). The Fifth Circuit holds that a detained person “does not need to show that death or serious illness has yet occurred to obtain relief. He must show that the conditions pose a substantial *risk of harm*.” *Gates v. Cook*,

¹⁰ Any condition that violates the Eighth Amendment rights individuals who are in prison, necessarily amounts to punishment of individuals in civil immigration detention and thereby violates the due process rights of Plaintiffs.

376 F.3d 323, 339 (5th Cir. 2004) (emphasis added). In *Gates*, where individuals on Death Row challenged overheated temperatures as violating the Eighth Amendment, the Fifth Circuit upheld a finding that the plaintiffs faced a substantial risk of serious harm based on expert testimony substantiating a likelihood of death. *Cook*, 376 F.3d at 339. But showing a likelihood of *actual* death is not required. As the Supreme Court ruled, housing individuals 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,” and prison officials cannot 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 v. McKinney*, 509 U.S. 25, 33 (1993). *See also Gates v. Collier*, 501 F.2d 1291, 1300 (5th Cir. 1974) (prison conditions, including the fact that “inmates with serious contagious diseases are allowed to mingle with the general prison population,” violate the Eighth Amendment).

In light of their age and medical vulnerability, and the impossibility of enforcing appropriate social distancing and sanitation measures, *see supra*, Factual Background Sec. II-V, Plaintiffs’ continued detention puts them at substantial risk of serious harm. Numerous courts across the country sitting in jurisdictions with palpable COVID-spread—only days ahead of Louisiana’s—have recognized the heightened risk to individuals in detention and have ordered their release.¹¹ Louisiana has had the fastest COVID-19 spread rate of any region in the world. Compl. ¶97. The substantial risk of serious harm to individuals in detention is imminent.

¹¹ *See, e.g., Thakker, et al. v. Doll, et al.*, No 1:20-cv-00480-JEJ (M.D. Pa. Mar. 31, 2020); *Fraihat v. Wolf, et al.*, ED CV 20-00590 TJH (KSx) (C.D. Cal. Mar 30, 2020); *Coronel, et al. v. Decker*, No. 1:20-cv-02472-AJN (S.D.N.Y. Mar. 27, 2020); *Calderon v. Cronen*, No. 18-10225 (MLW), ECF. 507 (D. Mass. Mar. 26, 2020); *Umana Jovel v. Thomas Decker, et al.*, No. 1:20-cv-00308-GBD-SN (S.D.N.Y. Mar. 24, 2020); *Basank, et al. v. Decker, et al.*, No. 1:20-cv-02518-AT, (S.D.N.Y. Mar. 26, 2020); *Xochihua-Jaimes v. Barr*, 18-71460, Doc. No. 53 (9th Cir. Mar. 23, 2020); *In the Matter of the Request to Commute or Suspend County Jail Sentences*, Case No. 84230 (N.J.

Defendants have actual knowledge of this substantial risk and are deliberately indifferent to it. The risk of COVID-19 to the health and lives of medically vulnerable individuals is front-page national and local news on a daily basis and, at this point, utterly obvious. *See Harris v. Hegmann*, 198 F.3d 153, 159 (5th Cir. 1999) (“A prison official’s knowledge of a substantial risk of harm may be inferred by the obviousness of the substantial risk”). ICE’s Guidance on COVID-19 recognizes these risks, and ICE’s prohibition on social visitation demonstrates a recognition of the importance of social distancing.¹² Medical experts from within DHS itself have described the risk of this virus to those in immigration detention.¹³ ICE has received numerous letters from experts, Members of Congress, and non-governmental organizations alerting it to the risk of COVID-19.¹⁴ Persons in immigration detention have protested against the conditions that render them vulnerable during this pandemic.¹⁵ The World Health Organization and the U.S. Centers for Disease Control have emphasized the risk of this disease, its infectiousness, and its severity in those with underlying medical conditions.¹⁶ There are daily news articles about the death toll of

Mar. 22, 2020); *Matter of Extradition of Toledo Manrique*, No. 19 MJ 71055, 2020 WL 1307109, at *1 (N.D. Cal. Mar. 19, 2020); *United States v. Martin*, No. 19 Cr. 140-13, 2020 WL 1274857, at *2 (D. Md. Mar. 17, 2020).

¹² *ICE Guidance on COVID-19*, U.S. Immigration and Customs Enforcement, <https://www.ice.gov/covid19>.

¹³ Catherine E. Shoichet, *Doctors warn of 'tinderbox scenario' if coronavirus spreads in ICE detention*, CNN, Mar. 20, 2020, available at <https://www.cnn.com/2020/03/20/health/doctors-ice-detention-coronavirus/index.html>.

¹⁴ *Letter from 763 non-governmental organizations to Matthew T. Albence*, Acting Director of ICE, Mar. 19, 2020, available at

<https://www.detentionwatchnetwork.org/sites/default/files/ICE%20Response%20to%20Coronavirus%20for%20People%20Detained%20-%20Organizational%20Sign%20on%20Letter%20-%20Final.pdf>; Letter from Rep. Carolyn Maloney and Rep. Jamie Raskin to Acting Secretary of DHS Chad Wolf (Mar. 11, 2020), available at

[https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2020-03-](https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2020-03-11.CBM%20and%20JR%20to%20Wolf-DHS%20re%20COVID-19.pdf)

[11.CBM%20and%20JR%20to%20Wolf-DHS%20re%20COVID-19.pdf](https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2020-03-11.CBM%20and%20JR%20to%20Wolf-DHS%20re%20COVID-19.pdf).

¹⁵ Alejandro Lazo, *Protests, Hunger Strikes Erupt Over Coronavirus in Immigration Detention*. The Wall Street Journal, Mar. 27, 2020, available at <https://www.wsj.com/articles/protests-hunger-strikes-erupt-over-coronavirus-in-immigration-detention-11585320903>; Debbie Nathan, *Women in ICE Detention, Fearing Coronavirus, Make Video to Protest Unsafe Conditions*, The Intercept (Mar. 30, 2020), available at <https://theintercept.com/2020/03/30/coronavirus-ice-detention/>.

¹⁶ *Information for Healthcare Professionals: COVID-19 and Underlying Conditions*, Center for Disease Control (accessed Mar. 27, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/hcp/underlying-conditions.html>; *Coronavirus disease 2019 (COVID-19) Situation Report – 51*, World Health Organization (accessed Mar. 31, 2020), available at https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200311-sitrep-51-covid-19.pdf?sfvrsn=1ba62e57_4.

COVID-19 and its impact on those with underlying medical conditions, particularly those in detention.¹⁷ In the face of this overwhelming evidenced Defendants continued detention of Plaintiffs amounts to deliberate indifference.

C. ICE Lacks A Constitutionally Adequate Purpose For Continued Detention.

Non-criminal confinement “constitutes a significant deprivation of liberty that requires due process protection,” and, thus, the government “must have ‘a constitutionally adequate purpose for the confinement.’” *Jones v. United States*, 463 U.S. 354, 361 (1983) (quoting *O’Connor v. Donaldson*, 422 U.S. 563, 574 (1975)). Accordingly, courts must ensure that the nature and duration of confinement bear “some reasonable relation to the purpose for which the individual is committed.” *Jackson v. Indiana*, 406 U.S. 715, 738 (1972); *Brown v. Taylor*, 911 F.3d 235, 243 (5th Cir. 2018). Once a valid basis for detention no longer exists, substantive due process requires the state to release the person. *Foucha*, 504 U.S. at 86 (ordering petitioner’s release from commitment to mental institution because there was no longer any evidence of mental illness); accord *Kansas v. Hendricks*, 521 U.S. 346, 363-64 (1997).

Continuing to detain Plaintiffs in conditions that impose a substantial risk of illness or death eviscerates any legitimate purpose for their detention. The Supreme Court has held that immigration detention is permissible to ensure the immigrant’s participation in their removal proceedings, to prevent flight, and to otherwise protect the community. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *Demore v. Kim*, 538 U.S. 510, 528 (2003). For individuals who are at high risk for serious illness or death from COVID-19, protection from the virus is a matter of life or

¹⁷ See, e.g., Abigail Hauslohner, Nick Miroff & Matt Zapposky, *Coronavirus Could Pose Serious Concern in ICE Jails, Immigration Courts*, The Washington Post, Mar. 12, 2020, available at https://www.washingtonpost.com/immigration/coronavirus-immigration-jails/2020/03/12/44b5e56a-646a-11ea845d-e35b0234b136_story.html; Josiah Rich, Scott Allen & Mavis Noah, *We Must Release Prisoners to Lessen the Spread of Coronavirus*, The Washington Post, Mar. 17 2020, available at <https://www.washingtonpost.com/opinions/2020/03/17/we-must-release-prisoners-lessen-spreadcoronavirus/>.

death, and no adequate measures are currently in place to mitigate against these risks. If detained persons are contagious, seriously ill, or otherwise dead, participation in legal proceedings will be medically or physically impossible, in violation of procedural due process, *see infra* Section I(C). And, as explained below, there is no credible argument that community safety requires their continued detention—instead, it compels the opposite.

C. Plaintiffs Are Likely To Prevail On Their Claim That Continued Detention Violates Procedural Due Process

When a governmental action limits a fundamental due process right to be free from detention, *see Foucha*, 504 U.S. at 80, *Demore v. Kim*, 538 U.S. 510, 561 (2003) (Souter, J., dissenting) (collecting cases), *Hernandez v. Sessions*, 872 F.3d 976, 981 (9th Cir. 2017), heightened scrutiny is applied. The action will be upheld only if the government shows it is necessary to promote a compelling governmental interest, *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996), and is implemented in a manner that is “carefully limited” and “narrowly focused.” *Foucha*, 504 U.S. at 81. The fundamental substantive rights afforded to those in civil detention¹⁸ mandate “strong procedural protections.” *Zadvydas v. Davis*, 533 U.S. 678, 691 (2001); *Demore v. Kim*, 538 U.S. 510, 551 (Souter, J., dissenting) (“the substantive demands of due process necessarily go hand in hand with the procedural”). At a minimum, procedural due process requires the right to be heard “at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

Absent immediate injunctive relief, Defendants will provide either no procedural protections or wholly deficient ones. As explained, the government’s only legitimate interest in Plaintiffs’ continued detention—either to minimize flight risk pending removal proceedings or to

¹⁸ Multiple courts have ruled that civilly detained individuals are afforded greater pretrial protections than their criminally-charged counterparts. *See note 8, supra*.

prevent danger to the community, *Zadvydas*, 533 U.S. at 690—has been eviscerated by the pandemic because the likelihood of Plaintiffs’ severe illness or death renders a meaningful removal proceeding a nullity. *See supra* Factual Background Sec. II-V. At the same time, there are more “narrowly focused” means to ensure Plaintiffs’ appearance in legal proceedings, which do not subject them to the dangers of detention, including supervised or conditional release¹⁹ that would suffice to meet the government’s interest without subjecting Plaintiffs to severe danger.

Nor can Plaintiffs avail themselves of any meaningful procedural protections in an already-overburdened immigration court system, one that is ill-equipped to respond to the truly exigent crisis presented by COVID-19. There is substantial evidence that detained persons in Louisiana facilities—under normal circumstances—have severe restrictions on access to counsel and the adjudicative process.²⁰ These restrictions have worsened; many judges postpone or simply fail to show up to their own hearings,²¹ rendering an already overburdened court system dysfunctional.²²

This is a core procedural due process violation, *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), as other courts faced with similar coronavirus spread in their respective jurisdictions have

¹⁹ *See, e.g., Immigration: Progress and Challenges in the Management of Immigration Courts and Alternatives to Detention Program*, U.S. Government Accountability Office, Sep. 18, 2018, <https://www.gao.gov/products/GAO-18-701T>; *Alternatives To Detention: Improved Data Collection and Analyses Needed to Better Assess Program Effectiveness*, U.S. Government Accountability Office, (Nov. 13, 2014), <https://www.gao.gov/products/GAO-15-26>.

²⁰ Plaintiffs are held in remote facilities, often upwards of five hours away from counsel and courts, Lopez ¶ 8; Scott Decl. ¶ 6, and access to attorney-client visits are sparse, if any, Lopez Decl. ¶ 4, Scott Decl. ¶¶ 8-9, 20. The already-sparse visitation in detention centers where Plaintiffs are held is diminishing, Scott Decl. ¶ 14, Rivera Decl. ¶¶ 6-10, Giardina Decl. ¶ 4, Trostle Decl. ¶¶ 7-8 and counsel to detained noncitizens in those facilities report having to provide their own ICE-mandated medically-protective equipment, Giardina Decl. ¶ 6, or risk spreading the virus to other clients, staff, or their families. Lopez Decl. ¶ 6; Scott Decl. ¶¶ 13-14, 18; Axelrod Decl. ¶ 18. Meaningful attorney-client communications rarely occur due to a host of logistical nightmares—the current wait to videoconference with a client is upwards of one week—and witness interviews, document collection, and hearing preparation routinely fail for lack of accessibility. Lopez Decl. ¶¶ 4-5; Scott Decl. ¶¶ 7-8, 10; Axelrod Decl. ¶¶ 7, 9-10; Giardina Decl. ¶¶ 3; Villareal Decl. ¶ 16; Trostle Decl. ¶ 8.

²¹ Scott Decl. ¶ 17; Huber Decl. ¶ 10.

²² Counsel for immigrants in removal proceedings consistently report a supremely dysfunctional immigration court structure, a system exacerbated by the COVID-19 pandemic, as practitioners describe a system struggling to manage caseloads, hold timely hearings, consider relevant evidence, or even have an Immigration Judge present. Lopez Decl. ¶ 6, 7; Scott Decl. ¶¶ 15-17, 20; Axelrod Decl. ¶¶ 8, 12; Rivera Decl. ¶¶ 14-16; Giardina Decl. ¶ 5; Fernandez Decl. ¶ 9; Trostle Decl. ¶¶ 7-9.

recognized. *See Coronel v. Decker*, CV 20-2472 (AJN) at *19-20 (S.D.N.Y. Mar. 27, 2020); *Jovel v. Decker*, No. CV 20-308 (GBD) (SN), 2020 U.S. Dist. LEXIS 52095, at *12-*16 (S.D.N.Y. Mar. 24, 2020). And, without immediate injunctive relief, Plaintiffs would have to attempt to safeguard their own constitutional rights before a court charged to consider only flight risk and dangerousness, not exigent threats to life and safety. *See Zadvydas*, 533 U.S. at 690; *In re Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006) (setting forth nine non-health-related factors IJ is to consider in setting bond). To safeguard Plaintiffs' procedural due process rights, this Court should order their outright release or a "narrowly focused" means to ensure future court appearances, such as supervised or conditional release. *See Reno v. Flores*, 507 U.S. 292, 343 (1993) (Stevens, J. dissenting) ("a blanket rule that simply *presumes* that detention is more appropriate than release to responsible adults is not narrowly focused on serving that interest.").

III. THE BALANCE OF THE EQUITIES AND THE PUBLIC INTEREST TILTS SHARPLY IN FAVOR OF PLAINTIFFS' RELEASE.

Where, as here, the Government is a party to the case, the third and fourth injunction factors—the balance of the equities and the public interest—merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009); *El Paso Cty., Texas v. Trump*, 407 F. Supp. 3d 655, 665 (W.D. Tex. 2019). As an initial matter, the public interest is served by the protection of constitutional rights. *See Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996); *Cohen v. Coahoma Co.*, 805 F. Supp. 398, 408 (N.D. Miss. 1992).

In addition, an injunction would also protect public health and safety, paramount considerations that weigh heavily in favor of an injunction. *See Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 472 (5th Cir. 2017); *see also Grand River Enterprises Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 169 (2d Cir. 2005) (referring to "public health" as a "significant public interest"); *Pashby v. Delia*, 709 F.3d 307, 331 (4th Cir. 2013)

(“the public interest in this case lies with safeguarding public health”); *Bianco v. Globus Med., Inc.*, No. 2:12-CV-00147-WCB, 2014 WL 1049067, at *11 (E.D. Tex. Mar. 17, 2014) (citing cases); *U.S. v. Barkman*, No. 3:19-cr-0052-RCJ-WGC, 2020 U.S. Dist. LEXIS 45628, at *4 (D. Nev. Mar. 17, 2020) (identifying risk of individuals carrying coronavirus into jails and noting that “[t]he men and women incarcerated at Washoe County Detention Facility are a part of our community and all reasonable measures must be taken to protect their health and safety.”).

The balance of equities also strongly tilts in Plaintiffs’ favor. As the Central District of California just held in ordering the release of detained children, “the public’s interest in preventing outbreaks of COVID-19 among families and children in ICE or ORR custody that will infect ICE and ORR staff, spread to others in geographic proximity, and likely overwhelm local healthcare systems tips the balance of equities sharply in Plaintiffs’ favor.” *Flores v. Barr*, No. CV 85-4544-DMG (AGRx), ECF. 740 at 12 (C.D. Cal. Mar. 28, 2020). Because Plaintiffs present no risk to community safety, the comparative burden to the government in releasing Plaintiffs is nominal. Release not only saves the government time and money, it actually *reduces* detention center density, decreasing the chances of COVID-transmission to both detained persons and staff, and avoids correspondingly escalating medical costs. Even if it did not tangibly benefit the government, the risk of catastrophic medical consequences would still tilt the equities in Plaintiffs’ favor. *See Hernandez*, 872 F.3d at 996 (“Faced with such a conflict between financial concerns and preventable human suffering, we have little difficulty concluding that the balance of hardships tips decidedly in plaintiffs’ favor.”).

IV. IMMEDIATE RELEASE IS THE ONLY EFFECTIVE REMEDY FOR PLAINTIFFS’ UNLAWFUL DETENTION, WHICH THE COURT HAS AMPLE AUTHORITY TO ORDER.

The Court has ample authority under 28 U.S.C. § 2241, and independently under Rule 65²³ to issue the release of detained persons—a remedy that has been ordered by numerous courts across the country in recent days. Habeas invests in federal courts broad, equitable authority to “dispose of the matter as law and justice require,” 28 U.S.C. § 2243, as the “very nature of the writ demands that it be administered with the initiative and flexibility.” *Harris v. Nelson*, 394 U.S. 286, 292 (1969).

While it is clear in this Circuit that habeas authorizes challenges to the fact or duration of detention, there is more ambiguity about whether habeas – as compared to traditional civil rights remedies against state officials, such as 42 U.S.C. § 1983 – authorizes challenges to conditions of confinement. *See Poree v. Collins*, 866 F.3d 235, 244 (5th Cir. 2017) (observing that “the Supreme Court has not foreclosed” habeas challenges for conditions claims and “declin[ing] to address whether habeas is available only for fact or duration claims.”); *Wilwording v. Swenson*, 404 U.S. 249, 251 (1971) (habeas challenging “living conditions and disciplinary measures” is “cognizable in federal habeas corpus”).

In any event, this habeas petition does not challenge conditions of confinement in the way this purported distinction imagines. Plaintiffs are not seeking judicial intervention in order to alleviate harsh conditions; it is precisely because there is no judicial possibility of remediating their unconstitutional confinement that they are challenging the very *fact* of their confinement. *See Malam v. Adducci, et al.*, No. 2:20-cv-10829-JEL-APP, ECF No. 22 at p. 8 (E.D. Mich. Apr. 5, 2020) (habeas appropriate for COVID-19 release because petitioner “seeks immediate release from confinement as a result of there being no conditions of confinement sufficient to prevent

²³ *See Brown v. Plata*, 563 U.S. 493, 511 (2011) (“When necessary to ensure compliance with a constitutional mandate, courts may enter orders placing limits on a prison’s population.”).

irreparable constitutional injury under the facts of her case.”). As such, they seek “relief from unlawful imprisonment or custody.” *Pierre v. United States*, 525 F.2d 933, 935-36 (5th Cir. 1976); *see also Poree*, 866 F.3d at 244 (petition seeking transfer to facility with less restrictive conditions “properly sounds in habeas”). Habeas confers “broad discretion in conditioning a judgment granting habeas relief . . . ‘as law and justice require’.” *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) (quoting 28 U.S.C. § 2243). That authority includes an order of release, *Boumediene v. Bush*, 553 U.S. 723, 779 (2008), so as “to insure that miscarriages of justice . . . are surfaced and corrected.” *Harris*, 394 U.S. at 291.

Separately, under Rule 65 and a court’s inherent equitable authority to remedy unconstitutional government conduct, courts may issue “orders placing limits on a prison’s population.” *Brown v. Plata*, 563 U.S. 493, 511 (2011). *See also Duran v. Elrod*, 713 F.2d 292, 297-98 (7th Cir. 1983), *cert. denied*, 465 U.S. 1108 (1984) (affirming order releasing low-bond individuals in pretrial detention as necessary to reach a population cap); *Mobile Cty. Jail Inmates v. Purvis*, 581 F. Supp. 222, 224-26 (S.D. Ala. 1984) (exercising remedial powers to order a prison’s population reduced to alleviate unconstitutional conditions.)

In the midst of this unprecedented public health crisis, numerous courts considering the plight of detained individuals have similarly ordered release. *See Xochihua-Jaimes v. Barr*, 18-71460, Doc. No. 53 (9th Cir. Mar. 23, 2020) (sua sponte release from immigration detention due to rapidly escalating health crisis); *In re Matter of Toledo Manrique*, No. 19-MJ-71055-MAG-1 (TSH), 2020 WL 1307109, at *1 (N.D. Cal. Mar. 19, 2020) (“risk that this vulnerable person will contract COVID-19 while in jail is a special circumstance that warrants bail.”); *United States v. Stephens*, No. 15-cr-95 (AJN), 2020 U.S. Dist. LEXIS 47846, at *2-3 (S.D.N.Y. Mar. 18, 2020) (granting emergency motion for reconsideration of bail in light of COVID-19 pandemic); *United*

States v. Raihan, No. 20-cr-68-BMC- JO, ECF No. 20, Proc. at 10:12-19 (E.D.N.Y. Mar. 12, 2020) E.C.F. No. 20 (“[t]he more people we crowd into that facility, the more we’re increasing the risk to the community”); *Manrique*, 2020 WL 1307109 at *1 (74 year-old presents “risk that this vulnerable person will contract COVID-19 while in jail [which] is a special circumstance that warrants bail”).²⁴

V. THE COURT SHOULD NOT REQUIRE PLAINTIFFS TO PROVIDE SECURITY PRIOR TO ISSUING A TEMPORARY RESTRAINING ORDER.

Federal Rule of Civil Procedure 65(c) provides that “[t]he court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.” The Fifth Circuit has determined that “the amount of security required pursuant to Rule 65(c) ‘is a matter for the discretion of the trial court,’” and that “the court ‘may elect to require no security at all.’” *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 628 (5th Cir. 1996) (quoting *Corrigan Dispatch Company v. Casa Guzman*, 569 F.2d 300, 303 (5th Cir. 1978)).

District courts routinely exercise this discretion to require no security in cases brought by indigent and/or incarcerated people. *See, e.g., Cole v. Livingston*, No. 4:14-CV-1698, 2016 U.S. Dist. LEXIS 80345, at *23 (S.D. Tex. June 21, 2016) (state prisoners), *vacated on other grounds*, *Yates v. Collier*, 677 F. App’x 915 (5th Cir. 2017); *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 385 n. 42 (C.D. Cal. 1982) (detained immigrants). This Court should do the same here.

²⁴ Courts maintain this authority to order those detained in violation of their due process rights released, notwithstanding § 1226(c). *See Cabral v. Decker*, 331 F. Supp. 3d 255, 259 (S.D.N.Y. 2018) (collecting cases). *see also Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001) (where a case presents “extraordinary circumstances . . . that make the grant of bail necessary to make the habeas remedy effective,” federal courts have the inherent authority to release individuals from immigration detention pending final disposition of their claims); *Leslie v. Holder*, 865 F. Supp. 2d 627, 639 (M.D. Pa. 2012) (“extraordinary circumstances” warranting immigrant’s release on habeas); *Sanchez v. Winfrey*, No. CIV.A.SA04CA0293RFNN, 2004 WL 1118718, at *3 (W.D. Tex. Apr. 28, 2004) (same).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant the motion for a temporary restraining order and order their immediate release from custody.

Dated: April 14, 2020

Respectfully submitted,

/s/ William P. Quigley

William P. Quigley, La Bar No. 07769

Quigley77@gmail.com

LOYOLA LAW CLINIC

7214 St. Charles Avenue

New Orleans, LA 70118

504.710.3074

Sirine Shebaya*

sirine@nipnlg.org

Matthew S. Vogel, La. Bar No. 35363**

matt@nipnlg.org

**NATIONAL IMMIGRATION PROJECT
OF THE NATIONAL LAWYERS GUILD**

2201 Wisconsin Ave NW, Suite 200

Washington, DC 20007

718.419.5876

Andrew Free*

Andrew@ImmigrantCivilRights.com

LAW OFFICE OF R. ANDREW FREE

P.O. Box 90568

Nashville, TN 37209

844.321.3221 x.1

Baher Azmy*

bazmy@ccrjustice.org

Ghita Schwarz*

gschwarz@ccrjustice.org

Angelo Guisado*

aguisado@ccrjustice.org

Lupe Aguirre*

laguirre@ccrjustice.org

Astha Sharma Pokharel*

asharmapokharel@ccrjustice.org

Aya Saed*

asaed@ccrjustice.org

Brittany Thomas*

bthomas@ccrjustice.org

CENTER FOR CONSTITUTIONAL RIGHTS

666 Broadway, 7th Floor

New York, NY 11201

212.614.6427

Jeremy Jong*

jermjong@gmail.com

3527 Banks St,

New Orleans, LA 70119

504.475.6728

*pro hac vice application forthcoming

**admission application pending

Counsel for Petitioners-Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2020, I electronically filed the foregoing document and accompanying motion, exhibits, and proposed order with the Clerk of the Court using the CM/ECF system. I further certify that I spoke with AUSA Seth Reeg on the telephone and advised him of this filing on April 13, 2020, prior to its filing. In addition, I will email copies of these documents to AUSA Seth Reeg at the following email address at the U.S. Attorney's Office for the Western District of Louisiana:

seth.reeg@usdoj.gov

Dated: April 14, 2020

/s/ William P. Quigley
William P. Quigley, La Bar No. 07769
Quigley77@gmail.com
LOYOLA LAW CLINIC
7214 St. Charles Avenue
New Orleans, LA 70118
504.710.3074