

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI**

Leyanis TAMAYO ESPINOZA, Edilia del
Carmen MARTINEZ, Jose Ruben LIRA
ARIAS, Viankis Maria YANES PARDILLO,
Ndikum Keshia Angu ANJOH, Anthony
BAPTISTE, Linda Chuo FRU,

Petitioner-Plaintiffs,

v.

Dianne WITTE, Matthew T. ALBENCE,
IMMIGRATION AND CUSTOMS
ENFORCEMENT, and
Shawn GILLIS,

Respondent-Defendants.

Civil Action No.:
5:20-cv106-DCB-MTP

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 Pandemic 2

 II. COVID-19 is Exceedingly Dangerous for Individuals Like Plaintiffs, Who Have Underlying Health Concerns..... 3

 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..... 5

 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 Claims 12

 A. Plaintiffs’ Continued Detention Violates Their Due Process Right to Protection from Harm and To Be Free From Punitive Conditions 12

 B. Continuing Detention Constitutes Deliberate Indifference to a Substantial Risk of Serious Harm 14

 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 Process 18

 III. The Balance of The Equities and The Public Interest Tilts Sharply In Favor of Plaintiffs’ Release 19

 IV. Immediate Release Is The Only Effective Remedy For Plaintiffs’ Unlawful Detention, Which The Court Has Ample Authority To Order 21

 V. The Court Should Not Require Plaintiffs To Provide Security Prior To Issuing A Temporary Restraining Order 24

CONCLUSION..... 24

INTRODUCTION

Today's global pandemic of the COVID-19 virus is the worst the world has seen since 1918.¹ Public health experts have warned 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.² Yet, Respondent-Defendants (“Defendants”) continue to detain close to one thousand individuals at the Adams County Detention Center (“Adams”) in Natchez, Mississippi, 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 seven individuals detained at Adams, who, due to their age and/or pre-existing medical conditions, are particularly vulnerable to serious illness or death if infected by COVID-19. While they are 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 commingle in tight proximity to others and because sanitary conditions in these facilities are poor.

¹ On April 1, 2020, Plaintiffs, along with thirteen other medically vulnerable individuals in immigration detention, filed a petition and motion for a temporary restraining order in the Eastern District of Louisiana, requesting the relief that Plaintiffs request here. Complaint, *Dada v. Witte*, No. 2:20-cv-01093 (E.D. La. Apr. 1, 2020), ECF No. 1; Plaintiffs' Memorandum in Support of Motion for a Temporary Restraining Order, *Dada v. Witte*, No. 2:20-cv-01093 (E.D. La. Apr. 1, 2020), ECF No. 2-1. Because the ICE Field Office in New Orleans has jurisdiction over the Adams County Detention Center, Plaintiffs argued that the ICE Field Office Director – as the “immediate custodian” – was the proper respondent, and that the Eastern District of Louisiana was the proper jurisdiction. Plaintiffs' Reply in Support of Motion for a Temporary Restraining Order at 6-9, *Dada v. Witte*, No. 2:20-cv-01093 (E.D. La. Apr. 4, 2020), ECF No. 9. However, the court declined to determine that the ICE Field Office Director was the immediate custodian, and therefore declined to exercise jurisdiction and dismissed “the claims without prejudice to refiling them in the appropriate district court.” *Dada v. Witte*, No. 2:20-cv-01093 (E.D. La. Apr. 5, 2020) (order dismissing without prejudice). Plaintiffs now request emergency relief in this court.

² 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>.

Even with the measures ICE is implementing to attempt 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 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 is the only meaningful way to protect Plaintiffs from grave, irreparable harm, and this Court, like many others that have already acted, is fully authorized to order it.

FACTUAL BACKGROUND

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

COVID-19 is a highly contagious disease easily transmitted through respiratory droplets, especially when one is within six feet of an infected individual. Declaration of Jaimie Meyer ¶ 20. It can result in severe and widespread damage to lungs, heart, liver, or other organs and in many cases results in death. *Id.* ¶ 21. A patient's condition can seriously deteriorate within days.³

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

³ 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>.

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.

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.*; Declaration of Lydia Bazzano ¶ 8. Individuals detained in immigration detention centers, including those detained at Adams, 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.

- **Leyanis Tamayo Espinoza** suffers from diabetes, hypertension, chronic renal issues, and malnutrition. Tamayo Espinoza ¶¶ 1, 3-8, 13, 19. Her medical conditions put her at high risk of complications if she contracts COVID-19. Bazzano Decl. ¶ 16(b). She has a place to live if released. Tamayo Espinoza Decl. ¶ 20.
- **Edilia Del Carmen Martinez** is 53 years old and suffers from diabetes, Martinez Decl. ¶¶ 2-3, putting her at high risk of complications if she contracts COVID-19. Bazzano Decl. ¶ 16(c). She has a place to live if released. Martinez Decl. ¶ 1.
- **Jose Ruben Lira Arias** is 46 years old and suffers from uncontrolled diabetes and hypertension. Lira Arias Decl. ¶¶ 3-4. He is at high risk of complications if he contracts COVID-19. Bazzano Decl. ¶ 16(a).
- **Viankis Maria Yanes Pardillo** is 49 years old and suffers from epilepsy, and has suffered numerous seizures while in detention. Yanes Pardillo Decl. ¶¶ 4-8. Her neurologic condition puts her at high risk of complications if she contracts COVID-19. Bazzano Decl. ¶ 16(d). She has a place to live if released. Yanes Pardillo Decl. ¶ 14..

- **Ndikum Keshia Angu Anjoh** is 19 years old and suffers from chronic respiratory distress and has a throat injury, which puts her at high risk of complications if she contracts COVID-19. Bazzano Decl. ¶ 16(e). She has a place to live if released. Anjoh Decl. ¶ 11.
- **Anthony Baptiste** is 59 years old and suffers from hypertension and untreated pre-diabetes. Baptiste Decl. ¶¶ 1, 5-7, 11. His age combined with these conditions put him at very high risk of complications if he contracts COVID-19. Bazzano Decl. ¶ 16(f). He has a place to live if released. Baptiste Decl. ¶ 1.
- **Linda Chuo Fru** is 26 years old and has untreated Hepatitis B and high blood pressure. Fru Decl. ¶¶ 1, 2-3, 5-6. These conditions put her at high risk of complications if she contracts COVID-19. Bazzano Decl. ¶ 16(g). She has a place to live if released. Fru Decl. ¶ 13.

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

The Adams facility is located in Natchez, Mississippi near the Louisiana border.⁴ As of April 15, 2020, there were 3,360 confirmed COVID-19 cases in Mississippi, and 122 deaths.⁵ Five individuals detained at Adams have been diagnosed with COVID-19.⁶

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, and in a federal prison in Louisiana.⁷ 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 Plaintiffs describe conditions in these facilities that render it impossible to practice social distancing: Plaintiffs describe crowded conditions, including 120 people sharing one dorm, 10 phones, and 10 showers. Tamayo Espinoza Decl. ¶ 17; Martinez Decl. ¶ 8; Lira Arias Decl. ¶ 7. To make matters worse, Defendants have not adopted adequate mitigation

⁴ Detention Facility Locator, U.S. Immigration and Customs Enforcement, *available at* <https://www.ice.gov/detention-facilities>.

⁵ Mississippi State Department of Health, *Coronavirus Disease 2019 (COVID-19)* (April 15, 2020), *available at* https://msdh.ms.gov/msdhsite/_static/14,0,420.html#Mississippi.

⁶ ICE Guidance on COVID19 - Confirmed Cases, U.S. Immigration and Customs Enforcement (April 15, 2020), *available at* <https://www.ice.gov/coronavirus>.

⁷ Kevin Johnson, *Prisoners sue for release from troubled federal prison where coronavirus has killed 5 inmates*, USA Today, Apr. 6, 2020, *available at* <https://www.usatoday.com/story/news/politics/2020/04/06/fed-prisoners-fear-virus-sue-release-troubled-prison/2954519001/>.

measures: detained individuals are routinely transferred between facilities (Tamayo Espinoza Decl. ¶ 18; Fru Decl. ¶ 4; Anjoh Decl. ¶ 6), staff at detention centers do not wear masks or gloves (Martinez Decl. ¶ 7; Lira Arias Decl. ¶ 5; Fru Decl. ¶ 10; Anjoh Decl. ¶ 9), and Plaintiffs have inadequate access to soap or hand sanitizer. (Yanes Pardillo Decl. ¶ 10; Lira Arias Decl. ¶ 9; Tamayo Espinoza Decl. ¶ 14). Plaintiffs also describe instances where individuals who are ill – including those presenting symptoms consistent with COVID-19 – are not isolated or treated. (Tamayo Espinoza Decl. ¶ 8; Lira Arias Decl. ¶ 10; Anjoh Decl. ¶ 6; Fru Decl. ¶ 5).

There are already five confirmed COVID-19 cases at Adams and nine additional cases at Louisiana detention facilities under the jurisdiction of the New Orleans ICE Field Office.⁸ 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.*, Tamayo Espinoza Decl. ¶ 18; Fru Decl. ¶ 4; Anjoh Decl. ¶ 6) it is only a short matter of time before the disease becomes widespread throughout Adams.

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 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;

⁸ ICE Guidance on COVID19 - Confirmed Cases, U.S. Immigration and Customs Enforcement (April 15, 2020), available at <https://www.ice.gov/coronavirus>.

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”).

On April 10, 2020, ICE’s Enforcement and Removal Office, (“ERO”) issued a document entitled “COVID-19 Pandemic Response Requirements” (“PRR”) outlining recommendations for detention facilities to contain the spread of the disease.⁹ For example, the PRR urges that facilities “adhere to CDC recommendations for cleaning and disinfection during the COVID-19 response,”¹⁰ which in turn urge that “staff and incarcerated/detained people performing cleaning wear PPE.”¹¹ However, as Plaintiff Ms. Fru describes, they are not provided with personal protective equipment (“PPE”) for cleaning at Adams. (Fru Decl. at ¶ 8). The PRR further states that “social distancing may not be possible in congregate settings such as detention facilities,” and instead, it recommends a number of alternative measures including directing detained people to “avoid congregating in groups of 10 or more, employing social distancing strategies at all times.”¹² Based on Plaintiffs’ descriptions of crowded conditions, this is not possible at Adams. Further, although ICE has temporarily suspended social visitation in all detention facilities, staff, contractors, and vendors continue to arrive and leave the detention centers.¹³ 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 adequately screen detained persons and staff for new, asymptomatic infection. *Id.* ¶ 30. Anything short of

⁹ ERO COVID-19 Pandemic Response Requirements (Apr. 10, 2020), *available at* <https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf>.

¹⁰ *Id.* at 9.

¹¹ for Disease Control, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities* (Mar. 23, 2020), *available at* <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>.

¹² *Id.* at 13.

¹³ *ICE Guidance on COVID-19*, U.S. Immigration and Customs Enforcement, *available at* <https://www.ice.gov/covid19>.

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 Adams facility have the resources necessary to engage in such an effort. *Id.* ¶¶ 25-30; Bazzano Decl. ¶ 19.

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 the Department of Homeland Security itself, have identified serious and substantial flaws in ICE’s medical care system.¹⁴

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.

Public health experts with experience addressing detention issues have recommended the release of vulnerable individuals from detention. Two DHS medical experts formally warned Congress of the severe public health risks of keeping individuals detained and recommended release of most persons in immigration detention, stating that “acting immediately will save lives not of only those detained, but also detention staff and their families, and the community-at-

¹⁴ DHS Office of the Inspector General, *Concerns About ICE Detainee Treatment and Care at Detention Facilities*, OIG-18-32 at 7 (Dec. 11, 2017), <https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-32-Dec17.pdf>. See also, e.g., U.S. Gov’t Accountability Off., GAO-16-23: *Immigration Detention: Additional Actions Needed to Strengthen Mgmt. and Oversight of Detainee Med. Care* (Feb. 2016), available at <https://www.gao.gov/assets/680/675484.pdf>; Human Rts. Watch *et al.*, *Code Red: The Fatal Consequences of Dangerously Substandard Med. Care in Immigration Detention*, at 15, 19, 25, 46 (June 2018), available at https://www.hrw.org/sites/default/files/report_pdf/us0618_immigration_web2.pdf; J. David McSwane, *ICE Has Repeatedly Failed to Contain Contagious Diseases, Our Analysis Shows. It’s a Danger to the Public*, PROPUBLICA (Mar. 20, 2020), available at <https://www.propublica.org/article/ice-has-repeatedly-failed-to-contain-contagious-diseases-our-analysis-shows-its-a-danger-to-the-public>.

large.”¹⁵ 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.”¹⁶

Releasing medically 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. The U.S. Department of Justice has recognized the threat posed by the spread of COVID-19 in prisons; on March 26, 2020, Attorney General Barr issued a directive to the Board of Prisons urging reduction of the prison population through the use of home confinement, and on April 3, he urged “dispatch” and particular prioritization for three federal prison facilities with COVID-19 outbreaks, including the Federal Correctional Institution in Oakdale, Louisiana.¹⁷ Across the United States, several jurisdictions including New Orleans, Los Angeles, New York, and Chicago have released detained individuals for the same reasons.¹⁸

¹⁵ 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>.

¹⁶ John Sandweg, *I Used to Run ICE. We Need to Release the Nonviolent Detainees*, *The Atlantic Monthly* (Mar. 22, 2020), *available at* <https://www.theatlantic.com/ideas/archive/2020/03/release-ice-detainees/608536/>.

¹⁷ See William Barr, *Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic*, Mar. 26, 2020, *available at* <https://www.politico.com/f/?id=00000171-1826-d4a1-ad77-fda671420000>; William Barr, *Increasing Use of Home Confinement at Facilities Most Affected by COVID-19*, Apr. 3, 2020, *available at* <https://www.politico.com/f/?id=00000171-4255-d6b1-a3f1-c6d51b810000>.

¹⁸ WDSU Digital Team, *Orleans Parish Sheriff’s Office releases some inmates with minor charges under COVID-19 plan*, WDSU (Mar. 19, 2020), *available at* <https://www.wdsu.com/article/orleans-parish-sheriffs-office-releases-some-inmates-with-minor-charges-under-covid-19-plan/31788756#>; Jan Ransom & Alan Feuer, *We’re Left for Dead: Fears of Virus Catastrophe at Rikers Jail*, *New York Times* (Mar. 30, 2020), *available at* <https://www.nytimes.com/2020/03/30/nyregion/coronavirus-rikers-nyc-jail.html>; Maura Dolan, Alene Tchekmedyan & Paige St. John, *California releases more jail inmates amid coronavirus crisis*, *Los Angeles Times* (Mar. 20, 2020), *available at* <https://www.latimes.com/california/story/2020-03-20/california-releases-more-jail-inmates-amid-coronavirus-crisis>; David Struett, *Cook County Jail releases several detainees ‘highly vulnerable’ to coronavirus*, *Chicago Sun-Time* (Mar. .17, 2020), *available at*

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.” *Id.* ¶¶ 35-36. In light of Plaintiffs’ medical conditions, Dr. Bazzano has determined that Plaintiffs face a substantial risk of complications as a result of continued detention. Bazzano Decl. ¶ 16 (a)-(g).

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 *civil* immigration detention to such a grave health risk. In the last two weeks, dozens of courts

<https://chicago.suntimes.com/coronavirus/2020/3/17/21183289/cook-county-jail-coronavirus-vulnerable-detainees-released-covid-19>.

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 deliberately 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 significant practical limitations on procedures 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

“[P]erhaps 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.” *Trinity USA Operating, L.L.C. v. Barker*, 844 F. Supp. 2d 781, 786 (S.D. Miss. 2011) (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*, 2020 WL 956362, at *14 (W.D. Tex. Feb. 27, 2020); *Turner v. Epps*, 842 F. Supp. 2d 1023, 1028 (S.D. Miss. 2012), *vacated on other grounds*, 460 Fed. App’x 322 (5th Cir. 2012),

(referring to “death itself” as the “single most irreparable harm of all). Short of death, Plaintiffs are at grave risk of contracting or exacerbating severe and potentially long-term medical conditions, Meyer Decl. ¶¶ 21, 28-29, 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 medical vulnerabilities, even those Plaintiffs who survive COVID-19 are at risk of long-term 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 ORR and ICE staff, healthcare providers, and local populations—and must be released. Meyer Decl. ¶¶ 35-37; Bazzano Decl. ¶¶ 16-18.

Plaintiffs can also satisfy demonstrate irreparable harm through a showing, *see infra* Section II, that Defendants have violated their constitutional rights. *See Opuient 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 (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).

Because they are in civil detention, Plaintiffs have a right to be free from punitive conditions of detention in ICE facilities. A person in civil immigration detention has due process rights that are similar to those of a person detained in pretrial detention prior to adjudication of guilt, *Edwards v. Johnson*, 209 F.3d 772, 778 (5th Cir. 2000).¹⁹ 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). While the Eighth Amendment protects individuals in prison from punishment that rises to “cruel and unusual,” the Due Process Clause protects individuals in detention from *any* punishment.

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

¹⁹ Some courts have held that individuals in immigration detention have greater protections than those in pretrial detention because immigration detention does not 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 medically compromised individuals in immigration detention in crowded, precarious conditions that subject them to a high risk of contagion, illness or death.

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: hypertension, diabetes, compromised immune system,

chronic renal issues, liver disease, and respiratory disorders. 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 648.²⁰ 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*, 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

²⁰ Any condition that violates the Eighth Amendment rights of individuals who are in prison, necessarily amounts to punishment of individuals in civil immigration detention and thereby violates the due process rights of Plaintiffs.

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 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. Courts across the country sitting in jurisdictions with palpable COVID-19 spread have recognized the heightened risk to individuals in detention and have ordered their release. *See, e.g., Thakker v. Doll*, No 1:20-cv-00480-JEJ, 2020 WL 1671563 (M.D. Pa. Mar. 31, 2020) (ordering the release of 13 medically vulnerable people from immigration detention to avoid an “unconscionable and possibly barbaric result.”)²¹ The substantial risk of serious harm to individuals in detention is imminent.

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

²¹ *See also, e.g., Malam v. Adducci*, No. 2:20-cv-10829-JEL-APP, 2020 WL 1809675 (E.D. Mich. Apr. 9, 2020) (opinion and order granting in part plaintiff-intervenors’ motion for a TRO); *Malam v. Adducci*, No. 2:20-cv-10829-JEL-APP, 2020 WL 1672662 (E.D. Mich. Apr. 5, 2020) (opinion and order granting in part plaintiffs’ motion for a TRO); *Hope v. Doll*, No. 1:20-cv-00562-JEJ (M.D. Pa. Apr. 7, 2020); *Fraihat v. Wolf*, ED CV 20-00590 TJH (KSx) (C.D. Cal. Mar 30, 2020); *Coronel v. Decker*, No. 1:20-cv-02472-AJN, 2020 WL 1487274 (S.D.N.Y. Mar. 27, 2020); *Calderon v. Wolf*, No. 18-10225 (MLW) (D. Mass. Mar. 26, 2020); *Jovel v. Decker*, No. 1:20-cv-00308-GBD-SN, 2020 WL 1502038 (S.D.N.Y. Mar. 24, 2020); *Basank v. Decker*, No. 1:20-cv-02518-AT, 2020 WL 1481503 (S.D.N.Y. Mar. 26, 2020); *Xochihua-Jaimes v. Barr*, 18-71460, 798 Fed. Appx. 52 (9th Cir. Mar. 24, 2020); *In the Matter of the Request to Commute or Suspend County Jail Sentences*, Case No. 84230 (N.J. Mar. 22, 2020). Those cases that are not available on electronic databases are attached to the Declaration of Cliff Johnson as Exhibit 10.

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.²² Medical experts from within DHS itself have described the risk of this virus to those in immigration detention.²³ ICE has received numerous letters from experts, Members of Congress, and non-governmental organizations alerting it to the risk of COVID-19.²⁴ Persons in immigration detention have protested against the conditions that render them vulnerable during this pandemic.²⁵ 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.²⁶ There are daily news articles about the death toll of COVID-19 and its impact on those with underlying medical conditions, particularly those in detention.²⁷ In the face of this overwhelming evidence, Defendants’ continued detention of Plaintiffs amounts to deliberate indifference.

²² *ICE Guidance on COVID-19*, U.S. Immigration and Customs Enforcement, <https://www.ice.gov/covid19>.

²³ Catherine E. Shochet, *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>.

²⁴ *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/2020-03-11.CBM%20and%20JR%20to%20Wolf-DHS%20re%20COVID-19.pdf>.

²⁵ 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>.

²⁶ *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.

²⁷ See, e.g., Ana Ceballos, *Two inmates at NW Florida prison die of COVID-19. State officials kept deaths secret*. Miami Herald (Apr. 15, 2020), available at <https://www.miamiherald.com/news/state/florida/article242039436.html>; Jaimie Meyer, Carlos Franco-Paredes, Parveen Parmar, Faiza Yasin, Matthew Gartland, *Comment: COVID-19 and the coming epidemic in U.S. immigration centers*, The Lancet (Apr. 15, 2020) available at <https://www.thelancet.com/action/showPdf?pii=S1473-3099%2820%2930295-4> (noting particular risk in “rural and semi-rural settings where many ICE detention facilities are located”)...

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

Civil 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*, 521 U.S. at 363-64.

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 death. If Plaintiffs are released, ICE can ensure that they attend immigration proceedings through supervised release. In contrast, continued detention puts Plaintiffs at substantial risk of serious illness or death, thereby jeopardizing Plaintiffs’ ability to attend or meaningfully participate in immigration proceedings. 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 detention²⁸ 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 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. This is a core procedural due process violation, *Mathews*, 424 U.S. at 333, as other courts faced with similar coronavirus spread in their respective jurisdictions have recognized. *See Coronel v. Decker*, CV 20-2472 (AJN), 2020 WL 1487274 at *9-10 (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). At the same

²⁸ Multiple courts have ruled that civilly detained individuals are afforded greater pretrial protections than their criminally-charged counterparts. *See note 8, supra*.

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 release²⁹ that would suffice to meet the government’s interest without subjecting Plaintiffs to severe danger.

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).

²⁹ *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>.

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). *See also, Thakker v. Doll*, No 1:20-cv-00480-JEJ, 2020 WL 1671563 at *9 (M.D. Pa. Mar. 31, 2020) (“Efforts to stop the spread of COVID-19 and promote public health are clearly in the public’s best interest, and the release of these fragile Petitioners from confinement is one step further in a positive direction.”). 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 *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 65 to issue the release of detained persons—a remedy that has been ordered by numerous courts across the country. 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. 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.”). *See also Malam v. Adducci*, No. 2:20-cv-10829-JEL-APP, 2020 WL 1672662 at *3 (E.D. Mich. Apr. 5 2020) (“where a petitioner claims no set of conditions would be sufficient to protect her constitutional rights, her claim should be construed as challenging the fact, not conditions, of her confinement and is therefore cognizable 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*, 553 U.S. at 779, so as “to insure that miscarriages of justice . . . are surfaced and corrected.” *Harris*, 395 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 other courts considering the plight of detained individuals have similarly ordered release. *See Hope v. Doll*, No. 1:20-cv-00562-JEJ (M.D. Pa. Apr. 7, 2020) (ordering petitioners’ release, reasoning “[w]e have before us clear evidence that the protective measures in place in the York and Pike County prisons are not working. We can only expect the number of positive COVID-19 cases to increase in the coming

days and weeks, and we cannot leave the most fragile among us to face that growing danger unprotected.”); *Thakker v. Doll*, No 1:20-cv-00480-JEJ, 2020 WL 1671563 (M.D. Pa. Mar. 31, 2020) (ordering petitioners’ release as ICE detention centers “are plainly not equipped to protect Petitioners from a potentially fatal exposure to COVID-19. While this deficiency is neither intentional nor malicious, should we fail to afford relief to Petitioners we will be a party to an unconscionable and possibly barbaric result.”); *Xochihua-Jaimes v. Barr*, 18-71460, Doc. No. 53 (9th Cir. Mar. 23, 2020) (sua sponte order of immediate release immigration detention due to rapidly escalating health crisis); *U.S. v. Stephens*, No. 15-cr-95 (AJN), 2020 WL 1295155 at *2-3 (S.D.N.Y. Mar. 31, 2020) (granting emergency motion for reconsideration of bail in light of COVID-19 pandemic); *United States v. Raihan*, No. 20-cr-68-BMC- JO, E.C.F. No. 20, Proc. At 10:12-19 (E.D.N.Y. Mar. 12, 2020) (“[t]he more people we crowd into that facility, the more we’re increasing the risk to the community”).³⁰

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 “The 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.” However, “Rule 65(c) invests the district court with discretion as to the amount of security required, if any.” *Jorgensen v. Cassidy*, 320 F.3d 906, 919 (9th Cir. 2003) (internal quotation marks and citation omitted). District courts routinely

³⁰ 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).

exercise this discretion to require no security in cases brought by indigent and/or incarcerated people. *See, e.g., Toussaint v. Rushen*, 553 F. Supp. 1365, 1383 (N.D. Cal. 1983) (state prisoners); *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 385 n. 42 (C.D. Cal. 1982) (detained immigrants). This Court should do the same here.

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 16, 2020

Respectfully submitted,

/s/ Cliff Johnson
Cliff Johnson
Cliff.Johnson@macarthurjustice.org
**MACARTHUR JUSTICE CENTER at the
UNIVERSITY OF MISSISSIPPI
SCHOOL OF LAW**
481 Chucky Mullins Drive
University, MS 38677
662.915.6863

Sirine Shebaya*
sirine@nipnlg.org
Matthew S. Vogel*
matt@nipnlg.org
**NATIONAL IMMIGRATION PROJECT
OF THE NATIONAL LAWYERS GUILD**
2201 Wisconsin Ave NW, Suite 200
Washington, DC 20007
718.419.5876

Jeremy Jong*
jermjong@gmail.com
3527 Banks St

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
Brittany Thomas*
bthomas@ccrjustice.org
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor

New Orleans, LA 70119
504.475.6728

New York, NY 11201
212.614.6427

**pro hac vice application forthcoming
Counsel for Petitioners-Plaintiffs*

CERTIFICATE OF SERVICE

I hereby certify that on April 16, 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 Angela Williams on the telephone and advised her of this filing on April 16, 2020, prior to its filing. In addition, I have emailed copies of these documents to AUSA Williams at the following email address at the U.S. Attorney's Office for the Southern District of Mississippi:

Angela.Williams3@usdoj.gov

Dated: April 16, 2020

/s/ Cliff Johnson
Cliff Johnson
Cliff.Johnson@macarthurjustice.org
MacArthur Justice Center
University of Mississippi School of Law
481 Chucky Mullins Drive
University, MS 38677