

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:20-cv-01050

JENNIFER (GARY) LEAFORD CODNER,

NDI WILFRED TEMAH,

MADELINE (FLAVIO) TATIS BELLIARD,

SANELA HAMZIC,

**RAFAEL SORIA MORA a/k/a BENIGNO
VELASQUEZ ARENAS,**

**NAOMI (LESTHER RAFAEL) HERNANDEZ
MORALES,**

**HEIDI NICOLE (NILSON SALMON)
HIDALGO MENDOZA,**

VIOLET (ADAN) PAZ ALVAREZ,

**ALEXA (ALEXANDER) MARROQUIN
GONZALEZ,**

ALISON (MELVIN) MENDOZA MENDOZA,

**IVIAN (JOSE ANGEL) MONTES
HERNANDEZ,**

**MONSERRAT (RONY MOISES) RAMOS
SIERRA,**

**ALEXANDRA (BENJAMIN ELISEO)
OSORIO LINARES,**

and

**BRITANY (JOSE ANTONIO) RIVIERA
CALERO,**

Plaintiffs-Petitioners,

v.

**JOHNNY CHOATE, IN HIS OFFICIAL
CAPACITY AS WARDEN OF THE AURORA
CONTRACT DETENTION FACILITY
OWNED AND OPERATED BY GEO GROUP
INC.**

**JOHN FABBRICATORE, IN HIS OFFICIAL
CAPACITY AS DENVER ICE ERO ACTING
FIELD OFFICE DIRECTOR,**

**MATTHEW T. ALBENCE, IN HIS OFFICIAL
CAPACITY AS DEPUTY DIRECTOR AND
SENIOR OFFICIAL PERFORMING THE
DUTIES OF THE DIRECTOR OF THE U.S.
IMMIGRATION AND CUSTOMS
ENFORCEMENT, and**

**IMMIGRATION AND CUSTOMS
ENFORCEMENT,**

Respondents-Defendants.

PETITIONERS' MOTION FOR TEMPORARY RESTRAINING ORDER

Plaintiff-Petitioners Jennifer (Gary) Leaford Codner, Ndi Wilfred Temah, Madeline (Flavio) Tatis Belliard, Sanela Hamzic, Rafael Soria Mora a.k.a. Benigno Velasquez Arenas, Alison (Melvin) Mendoza Mendoza, Naomi (Lesther Rafael) Hernandez Morales, Heidi Nicole (Nilson Salmon) Hidalgo Mendoza, Violet (Adan) Paz Alvarez, Britany (Jose Antonio) Riviera Calero, Alexa (Alexander) Marroquin Gonzalez, Iviiian (Jose Angel) Montes Hernandez, Monserrat (Rony Moises) Ramos Sierra, and Alexandra (Benjamin Eliseo) Osorio Linares (collectively, “Petitioners”) move for a temporary restraining order and preliminary injunctive relief pursuant to Federal Rule of Civil Procedure 65 against Johnny Choate, in his official capacity as Warden of the Aurora Contract Detention Facility (the “Aurora facility”); John Fabbriatore, in his official capacity as Denver ICE ERO Acting Field Office Director; Matthew T. Albence, in his official capacity as Deputy Director and Senior Official Performing the Duties of the Director of the U.S. Immigration and Customs Enforcement; and U.S. Immigrations and Customs Enforcement (“ICE”) (collectively, “Defendants”).

INTRODUCTION

Petitioners seek a temporary restraining order directing their immediate release from custody. If not released, Petitioners face a serious and heightened risk of illness or death from COVID-19 because of their pre-existing medical conditions. Petitioners are among the most vulnerable populations at the Aurora facility, and Defendants cannot adequately protect them in the detention center. The only means to protect these at-risk individuals is to release them from custody immediately.

Detention centers like the Aurora facility are tinderboxes for highly transmissible infectious diseases such as COVID-19. Indeed, the risk of a widespread outbreak of COVID-19 at

the Aurora facility is not theoretical—it is undisputed that the facility has already had confirmed cases of COVID-19. Five employees who work at the facility have tested positive for the virus, at least one of whom had direct contact with detained persons.¹ Given the high population density at the Aurora facility, the ease of transmission of this viral pathogen and the fact that the facility is not taking sufficient measures to prevent the spread, it is a matter not of if, but of when COVID-19 will spread throughout the detained population, if it hasn't already.

The Aurora facility lacks the proper resources to provide adequate medical care to the detained population if there is an outbreak. Petitioners in this case, whose individual medical histories and circumstances put them at higher risk of severe complications or death from COVID-19, cannot wait for the inevitable outbreak to occur. The danger posed by Petitioners' continued detention 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, Petitioners will continue to face the imminent risk of severe illness or death. The Department of Homeland Security ("DHS")'s own medical experts have recognized the danger of COVID-19 outbreaks at ICE detention facilities and advised that ICE needs

¹ Conor McCormick-Cavanaugh, *Three More Employees at Aurora ICE Facility Test Positive for COVID-19*, Westword (Apr. 8, 2020), <https://www.westword.com/news/three-geo-group-staffers-at-ice-facility-in-aurora-test-positive-for-covid-19-11683722>. In addition, there have been multiple quarantines due to COVID-19 exposure. Sam Tabachnik, *Ten Detainees at Aurora's ICE Detention Facility Isolated for Possible Exposure to Coronavirus*, Denver Post (Mar. 17, 2020), <https://www.denverpost.com/2020/03/17/coronavirus-ice-detention-geo-group-aurora-colorado/>.

to release medically vulnerable individuals in order to avoid a public health disaster.² Reaching the same conclusion, many courts have already ordered the release of at-risk detained individuals to protect them from grave harm posed by the virus. *See, e.g., Hope v. Doll*, No. 1:20-cv-00562-JEJ, ECF No. 11 (M.D. Pa. Apr. 7, 2020) (granting TRO releasing high-risk individuals in immigration detention due to the dangers of COVID-19); *Thakker v. Doll*, No. 1:20-cv-00480-JEJ, ECF No. 47 (M.D. Pa. Mar. 31, 2020) (same); *Coronel v. Decker*, No. 20-cv-2472-AJN, ECF No. 26 (S.D.N.Y. Mar. 27, 2020) (same); *Bravo Castillo v. Barr*, No. 5:20-cv-00605-TJH-AFM, ECF No. 32, slip op. at 11 (C.D. Cal. Mar. 27, 2020) (ordering release of petitioners upon concluding “[t]his is an unprecedented time in our nation’s history . . . [b]ut in the time of a crisis, our response to those at particularly high risk must be with compassion and not apathy. The Government cannot act with a callous disregard for the safety of our fellow human beings”); *Basank v. Decker*, No. 1:20-cv-02518-AT, ECF No. 11, slip op. at 10 (S.D.N.Y. Mar. 26, 2020) (granting TRO based on concluding “[t]he risk that Petitioners will face a severe, and quite possibly fatal, infection if they remain in immigration detention constitutes irreparable harm”); *see also Xochihua-Jaimes v. Barr*, No. 18-71460, ECF No. 53 (9th Cir. Mar. 23, 2020) (“In light of the rapidly escalating public health crisis, which public health authorities predict will especially impact immigration detention centers, the court sua sponte orders that Petitioner be immediately released from detention”) (collectively, Ex. S).

The standards for Rule 65 injunctive relief are met here. Petitioners will suffer irreparable harm unless an injunction is issued; Petitioners have a substantial likelihood of prevailing on the

² Catherine Shoichet, *Doctors Warn of ‘Tinderbox Scenario’ If Coronavirus Spreads in ICE Detention*, CNN (Mar. 20, 2020), <https://www.cnn.com/2020/03/20/health/doctors-ice-detention-coronavirus/index.html>.

merits; the balance of harms strongly favors Petitioners; and an injunction serves the public interest. Accordingly, Petitioners seek a temporary restraining order directing their immediate release from custody.

FACTUAL BACKGROUND

I. COVID-19 Poses A Rapidly Spreading Public Health Crisis With Grave Risk Of Serious Illness, Injury Or Death

The coronavirus that causes COVID-19 has led to a global pandemic that continues to spread at a swift rate worldwide and across Colorado. On March 11, 2020, the World Health Organization (“WHO”) labeled the outbreak a global “pandemic,” when the organization had identified 118,000 cases in 114 countries.³ The WHO reports (as of April 12, 2020) that there are just under 1,700,000 reported COVID-19 cases throughout the world and more than 105,000 deaths.⁴ The United States is one of the worst-hit countries, with 577,842 reported cases and 23,232 deaths as of April 13, 2020.⁵ These numbers mark the highest incidence in any country of COVID-19 cases and virus-related deaths, and they continue to rise. Confirmed cases in the state of Colorado are also rising at an exponential rate. On April 12, 2020, the state reported 7,691 total cases—an increase of 376 cases

³ Tedros A. Ghebreyesus, Dir.-Gen., *WHO Director-General’s Opening Remarks at the Media Briefing on COVID-19*, World Health Org. (Mar. 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

⁴ *Coronavirus Disease 2019 (COVID-19) Situation Report – 83*, World Health Org. (last visited Apr. 12, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200412-sitrep-83-covid-19.pdf?sfvrsn=697ce98d_4.

⁵ *COVID-19 Map*, Johns Hopkins U. Coronavirus Resource Center (Apr. 13, 2020, 4:34 PM), <https://coronavirus.jhu.edu/map.html>.

since the prior day.⁶ Dr. Deborah Birx, the White House’s coronavirus response coordinator, has said that Colorado is a “new hot spot” for the virus.⁷ Dr. Anthony Fauci, the government’s top infectious-disease doctor, agrees, and has said that he is particularly worried about Colorado, advising that “[n]ow is not the time to pull back . . . [i]t’s the time to intensify” mitigation efforts.⁸

COVID-19 is a highly contagious disease that is easily transmitted through respiratory droplets, close personal contact and contact with contaminated surfaces and objects. Decl. of Dr. Carlos Franco-Paredes, MD, MPH (“Dr. Franco-Paredes”), Ex. A, ¶ 15. It can severely damage lung tissue, affect cardiac functions, and cause neurological damage, loss of respiratory capacity, and multiorgan dysfunction. *Id.* ¶ 10. A patient’s condition can seriously deteriorate within days, and COVID-19 may result in long-term injury or death. *Id.* ¶¶ 10–12. Those who develop serious complications will need advanced support, highly specialized equipment that is in limited supply and an entire team of care providers, including 1:1 or 1:2 nurse to patient ratios, respiratory therapists and intensive care physicians. *Id.* ¶ 14. This level of support is especially difficult to provide to detained individuals. *See id.* ¶ 30-31. There is no vaccine against COVID-19, nor any known medication to prevent or treat infection from the virus. *Id.* ¶ 16. Moreover, it is not known whether people previously infected with COVID-19 can become re-infected. *Id.*

⁶ *Case Data*, Colo. Dep’t of Pub. Health & Env’t (Apr. 13, 2020, 4:37 PM), <https://covid19.colorado.gov/case-data>.

⁷ Kat Lonsdorf, *Confirmed Cases in the U.S. Top 300,000 As New Hot Spots Emerge*, NPR (Apr. 5, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/05/827605603/confirmed-cases-in-the-u-s-top-300-000-as-new-hot-spots-emerge>.

⁸ Lateshia Beachum et al., *U.S. Authorities Believe Rising Coronavirus Death Toll Is Indicator of Past Failures, But Hope Americans Have Learned*, Wash. Post (Apr. 8, 2020), https://www.washingtonpost.com/national/coronavirus-us-death-toll-rises/2020/04/08/3c1a9e3a-795c-11ea-a130-df573469f094_story.html.

Jail settings—like the Aurora facility—are hotbeds for outbreaks of COVID-19. Current outbreaks in jails and prisons around the country provide alarming evidence. Cook County Jail is reportedly the nation’s largest known source of connected coronavirus infections, with close to 500 confirmed cases.⁹ At Rikers Island in New York City, the rate of COVID-19 transmission is estimated to be the highest in the world, at over seven times the rate of infection in New York City generally and nearly 56 times greater than the rate of spread in the general U.S. population.¹⁰ And at the Oakdale Federal Correctional Center in Louisiana—where four staff members have tested positive and six incarcerated individuals have died of COVID-19—officials have simply given up on testing individuals who show symptoms of the virus. The incarcerated population is simply presumed to be COVID-19 positive due to “sustained transmission.”¹¹ Immigration detention facilities have faced similar outbreaks of other infectious diseases in recent years. As recently as last year, for example,

⁹ Timothy Williams & Danielle Ivory, *Chicago’s Jail Is Top U.S. Hot Spot As Virus Spreads Behind Bars*, N.Y. Times (Apr. 8, 2020), <https://www.nytimes.com/2020/04/08/us/coronavirus-cook-county-jail-chicago.html>; *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. Times, available at <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (last visited Apr. 13, 2020) (reporting that, as of April 13, 2020, at 12:51 AM, 492 confirmed cases were connected to Cook County Jail).

¹⁰ These numbers likely underestimate the infection rate on Rikers Island, as they do not include the number of people who contracted COVID-19 on Rikers Island but who have already been released. The rates of infection rely on publicly released data collected by the Legal Aid Society. *Analysis of COVID-19 Infection Rate in NYC Jails*, Legal Aid Soc’y (Apr. 7, 2020), https://legalaidnyc.org/wp-content/uploads/2020/04/4_7_Analysis-of-COVID-19-Infection-Rate-in-NYC-Jails.pdf.

¹¹ Kimberly Kindy, *Inside the Deadliest Federal Prison, the Seeping Coronavirus Creates Fear and Danger*, Wash. Post (Apr. 10, 2020), https://www.washingtonpost.com/national/inside-the-deadliest-federal-prison-the-seeping-coronavirus-creates-fear-and-danger/2020/04/09/deceeb6e-75b4-11ea-a9bd-9f8b593300d0_story.html; Greg LaRose, *Oakdale Federal Prison Stops Testing Inmates with COVID-19 Symptoms*, WDSU News (Mar. 31, 2020), <https://www.wdsu.com/article/oakdale-federal-prison-stops-testing-inmates-with-covid-19-symptoms/31989498>.

ICE failed to take adequate measures to protect detained immigrants against outbreaks of chicken pox and mumps.¹²

It is simply not possible for jails or detention centers to fully implement critical COVID-19 preventive measures set forth by the Centers for Disease Control and Prevention (“CDC”): social distancing (maintaining a distance of at least six feet between oneself and others), preventive hygiene and the medical isolation of confirmed or suspected COVID-19 cases. Decl. of Dr. Franco-Paredes, Ex. A, ¶¶ 18–20.¹³ At the Aurora facility, like at Cook County Jail, Rikers Island and the Oakdale federal prison, people eat, sleep and engage in activities in close proximity to each other, and basic supplies, such as soap and hand sanitizer, are often in short supply or unavailable. *See, e.g.*, Decl. of C. Cowgill, Ex. B, ¶¶ 17, 20; Decl. of L. Jordan, Ex. C, ¶¶ 15, 17, 18; Decl. of J. Codner, Ex. D, ¶ 7; Decl. of N. Temah, Ex. E, ¶¶ 8–9; Decl. of S. Hamzic, Ex. G, ¶¶ 7–8; Decl. of R. Mora, Ex. H, ¶¶ 5, 9–10, 12. Moreover, COVID-19 is able to survive for extended periods of time on materials that are highly prevalent in secure settings, such as metals and other non-porous surfaces. Decl. of Dr. Franco-Paredes, Ex. A, ¶ 28. Sufficiently frequent disinfection and decontamination of all surfaces in the facility is exceedingly difficult given the large number of incarcerated individuals, frequent interactions between incarcerated individuals and staff and regularity with which staff move in and out of various parts of the Aurora facility. *Id.*

¹² Emma Ockerman, *Migrant Detention Centers Are Getting Slammed with Mumps and Chickenpox*, Vice News (Jun. 14, 2019), https://www.vice.com/en_us/article/mb8k5q/migrant-detention-centers-are-getting-slammed-with-mumps-and-chicken-pox.

¹³ *See also Coronavirus (COVID-19)*, Centers for Disease Control & Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/index.html> (“CDC Guidance”) (discussing social distancing, preventive hygiene and the medical isolation of confirmed or suspected COVID-19 cases as critical prevention methods).

Outbreaks inside detention facilities pose serious risks to the general public as well. “As local hospital systems become overwhelmed by the patient flow from detention center outbreaks, precious health resources will be less available for people in the community.”¹⁴ For this reason, healthcare professionals—including two of DHS’s own medical experts—have urgently called for the release of detained immigrants, particularly elderly or medically vulnerable ones.¹⁵

II. Petitioners Face Particularly High Threats From COVID-19 Because Of Underlying Health Conditions.

Due to their underlying medical conditions and compromised health, Petitioners are at heightened risk of serious complications if they contract COVID-19. Decl. of Dr. Franco-Paredes, Ex. A, ¶¶ 13, 39–45. The CDC has identified that people, like Petitioners, with serious medical conditions seem to “be at higher risk for severe illness from COVID-19.”¹⁶ And according to the WHO, “persons with pre-existing medical conditions [like Petitioners] . . . appear to develop serious illness more often than others.”¹⁷ Individuals at higher risk for severe illness include those with lung disease, asthma, serious heart conditions, hypertension, diabetes, obesity and compromised immune systems (such as from HIV or cancer). Decl. of Dr. Franco-Paredes, Ex. A, ¶ 13.¹⁸

¹⁴ Letter from Dr. Scott Allen & Dr. Josiah Rich to House Comm. on Homeland Sec. at 4 (Mar. 19, 2020), *available at* <https://assets.documentcloud.org/documents/6816336/032020-Letter-From-Drs-Allen-Rich-to-Congress-Re.pdf> (“DHS Expert Letter”); *see also* Shoichet, *supra* n.2 (quoting letter).

¹⁵ DHS Expert Letter, *supra* n.14, at 5.

¹⁶ *See People Who Are at Higher Risk for Severe Illness*, Centers for Disease Control & Prevention, last updated Apr. 2, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html> (“CDC Risk Factors”).

¹⁷ *Q&A on Coronaviruses (COVID-19)*, World Health Org., Apr. 8, 2020, <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses>.

¹⁸ *See also* CDC Risk Factors.

People with diabetes, like Ms. Hamzic and Ms. Mendoza Mendoza, for example, are more likely to suffer from severe and possibly fatal complications if they contract COVID-19.¹⁹ In Italy, where over 20,000 people have died from the disease,²⁰ diabetes has been determined to be the “second most common condition among COVID-19 patients who died: 35.5% had the illness.”²¹ Meanwhile, approximately 76 percent of patients in Italy who died from COVID-19 had hypertension, like Ms. Hamzic, Mr. Temah, Mr. Soria Mora and Ms. Codner.²² Likewise, “[p]atients with existing illnesses that cause breathlessness, wheezing or lung problems”—like Ms. Hamzic (who has only one lung), Ms. Codner, Ms. Belliard and Mr. Soria Mora—“run a higher risk of developing severe cases of COVID-19 infection.”²³ “Patients with shortness of breath [are] 3.7 times more likely to have severe COVID-19 disease and 6.6 times more likely to need intensive care than those

¹⁹ See CDC Risk Factors; see also Fei Zhou et al., *Clinical Course and Risk Factors for Mortality of Adult Inpatients with COVID-19 in Wuhan, China: A Retrospective Cohort Study*, 395 *Lancet* 1054 (2020), available at [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)30566-3/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30566-3/fulltext) (finding that people with diabetes had much higher rates of serious complications and death than people without diabetes).

²⁰ *COVID-19 Map*, Johns Hopkins U. Coronavirus Resource Center (Apr. 13, 2020, 10:50 PM), <https://coronavirus.jhu.edu/map.html>.

²¹ Anna M. Miller et al., *10 Common Health Conditions that Increase Risk of Death from the Coronavirus, including Diabetes and Heart Disease*, *Bus.* (Mar. 23, 2020), <https://www.businessinsider.com/hypertension-diabetes-conditions-that-make-coronavirus-more-deadly-2020-3>.

²² *Id.*

²³ Kate Kelland, *Patients with Breathing, Lung Problems at Highest Risk with COVID-19 - Study*, *Reuters* (Mar. 18, 2020), <https://www.reuters.com/article/us-health-coronavirus-breathing/patients-with-breathing-lung-problems-at-highest-risk-with-covid-19-study-idUSKBN2153ED> (citing Vageesh Jain & Jin-Min Yuan, *Systematic Review and Meta-Analysis of Predictive Symptoms and Comorbidities for Severe COVID-19 Infection*, medRxiv (Mar. 16, 2020), <https://www.medrxiv.org/content/10.1101/2020.03.15.20035360v1>).

without.”²⁴ Dr. Franco-Paredes confirms that people living with HIV—like nine of the Petitioners—suffer from compromised immune systems and are therefore at a high risk of adverse clinical outcomes if infected with COVID-19. Decl. of Dr. Franco-Paredes, Ex. A, ¶¶ 13, 40–41.

Moreover, risks to certain Petitioners—like Ms. Hamzic, Ms. Paz Alvarez and Ms. Codner—are further exacerbated by their age. A recent study from the Chinese Center for Disease Control and Prevention showed that the virus more seriously affected older people with preexisting health problems—patients in their 50s had a death rate that was three times higher than the death rate for patients in their 40s.²⁵

Each of the Petitioners in this case suffers from an underlying condition that puts them at increased risk of serious illness or death, should they contract COVID-19.

- Jennifer (Gary) Leaford Codner is a 54-year-old transgender woman from Jamaica. Ms. Codner suffers from hypertension and allergies. Since being detained at the Aurora facility, she has suffered from boils on her skin. Decl. of J. Codner, Ex. D, ¶ 2-3.
- Ndi Temah is a 24-year-old man from Cameroon. Mr. Temah suffers from several serious medical conditions, including hypertension, Mobitz Type 1 (also known as Second Degree Atrioventricular Block, or Wenckebach, a disease of the electrical conduction system of the heart), post-traumatic stress disorder, depression and a severe anxiety disorder. Decl. of N. Temah, Ex. E, ¶¶ 1–2.
- Madeline (Flavio) Tatis Belliard is a 40-year-old transgender woman from the Dominican Republic. Ms. Belliard has been diagnosed with multiple physical and mental health disorders, including HIV, asthma, schizoaffective disorder (depressive type), gender identity disorder and dysthymic disorder. Decl. of M. Belliard, Ex. F, ¶¶ 1, 3.

²⁴ *Id.*

²⁵ See Aria Bendix, *Coronavirus Patients over Age 80 Have a Death Rate of 15%. Here’s the Death Rate for Every Age Bracket*, Bus. Insider (Feb. 27, 2020), <https://www.businessinsider.com/coronavirus-death-age-older-people-higher-risk-2020-2>.

- Sanela Hamzic is a 52-year-old woman from Bosnia. Ms. Hamzic has several diagnosed chronic conditions, including diabetes, asthma, high blood pressure, attention deficit disorder, depression and post-traumatic-stress disorder. Ms. Hamzic was also previously diagnosed with cancer in her lungs and ovaries, resulting in the removal of one of her lungs and a hysterectomy. She also recently received a mammogram, which detected lumps in her breast. Following the mammogram, a biopsy was performed, and it was recommended that Ms. Hamzic undergo surgery. Ms. Hamzic decided against the treatment because she was scared to undergo another surgery in detention. Decl. of S. Hamzic, Ex. G, ¶¶ 1, 3.
- Rafael Soria Mora a.k.a. Benigno Velasquez Arenas is a 46-year-old man from Mexico. Mr. Soria Mora has chronic asthma, for which he takes prescribed medication. He also suffers from hypertension and sleep apnea. The Aurora facility has recently been out of his prescribed medication, and the replacement medication the facility provides to him does not manage his symptoms as well as his prior medication. Decl. of R. Mora, Ex. H, ¶¶ 1, 5.
- Alison (Melvin) Mendoza Mendoza is a 35-year-old transgender woman from El Salvador. Ms. Mendoza Mendoza has diabetes, high triglycerides and high cholesterol. Decl. of A. Mendoza, Ex. I, ¶¶ 1, 5.
- Naomi (Lesther Rafael) Hernandez Morales is a 36-year-old transgender woman from El Salvador. Ms. Hernandez Morales is HIV-positive. Decl. of N. Morales, Ex. J, ¶¶ 1, 4.
- Heidi Nicole (Nilson Salmon) Hidalgo Mendoza is a 22-year-old transgender woman from El Salvador. Ms. Hidalgo Mendoza tested positive for HIV on April 2, 2020. She has received antiretrovirals on a daily basis since diagnosis but not at consistent times. Decl. of H. Mendoza, Ex. K, ¶¶ 1, 3, 5.
- Violet (Adan) Paz Alvarez is a 50-year-old transgender woman from Honduras. Ms. Paz Alvarez is HIV-positive and has been diagnosed with high triglyceride levels. Upon her arrival at the Aurora facility, she did not receive antiretroviral treatment for approximately a week. She is now receiving daily treatment but not at consistent times. Decl. of V. Alvarez, Ex. L, ¶¶ 1, 3.
- Britany (Jose Antonio) Riviera Calero is a 22-year-old transgender woman from Honduras. Ms. Riviera Calero is HIV-positive. Decl. of B. Calero, Ex. M, ¶¶ 1, 3.
- Alexa (Alexander) Marroquin Gonzalez is a 30-year-old transgender woman from El Salvador. Ms. Marroquin Gonzalez is HIV-positive. She receives antiretrovirals on a daily basis at the Aurora facility but not at consistent times. Decl. of A. Gonzalez, Ex. N, ¶¶ 1, 5.

- Ivian (Jose Angel) Montes Hernandez is a 27-year-old transgender woman from El Salvador. Ms. Montes Hernandez is HIV-positive. She receives antiretrovirals on a daily basis at the Aurora facility but not at consistent times. Decl. of I. Hernandez, Ex. O, ¶¶ 1, 4.
- Monserrat (Rony Moises) Ramos Sierra is a 31-year-old transgender woman from Honduras. Ms. Ramos Sierra is HIV-positive. Decl. of M. Sierra, Ex. P, ¶¶ 1, 3.
- Alexandra (Benjamin Eliseo) Osorio Linares is a 29-year-old transgender woman from El Salvador. Ms. Osorio Linares is HIV-positive. Decl. of A. Linares, Ex. Q, ¶¶ 1, 4.

III. The Aurora Facility Cannot Ensure Petitioners' Safety.

The Aurora facility does not adequately provide the mitigation measures that public health experts and the CDC recommend, which makes the rapid spread of COVID-19 at the Aurora facility very likely. Decl. of Dr. Franco-Paredes, Ex. A, ¶¶ 18–20, 47, 51. For example, several Petitioners describe conditions in the Aurora facility that render it impossible to practice social distancing. Detained persons sleep near one another and use common spaces together, such as tables and bathrooms. Decl. of C. Cowgill, Ex. B, ¶ 17; Decl. of L. Jordan, Ex. C, ¶¶ 15, 17.²⁶ Many detained individuals report that they are being instructed to maintain three feet of distance from other people because there is not enough room to maintain six feet of distance. Decl. of C. Cowgill, Ex. B, ¶ 20.

To make matters worse, the Aurora facility has not strengthened its cleanliness procedures in response to the COVID-19 pandemic. Bathrooms are used by large numbers of people and are not sanitized or disinfected after each use. Decl. of A. Mendoza, Ex. I, ¶ 10. Detained individuals report that there is not enough soap and sanitizer and that they are not being provided full personal protective

²⁶ See also Decl. of J. Codner, Ex. D, ¶ 7; Decl. of N. Temah, Ex. E, ¶¶ 8–9; Decl. of S. Hamzic, Ex. G, ¶¶ 7–8; Decl. of R. Mora, Ex. H, ¶¶ 9–10; Decl. of N. Morales, Ex. J, ¶¶ 11–12; Decl. of H. Mendoza, Ex. K, ¶ 13; Decl. of V. Alvarez, Ex. L, ¶ 7; Decl. of B. Calero, Ex. M, ¶ 12; Decl. of A. Gonzalez, Ex. N, ¶¶ 7, 8; Decl. of I. Hernandez, Ex. O, ¶¶ 9, 11; Decl. of M. Sierra, Ex. P, ¶¶ 6, 8; Decl. of A. Linares, Ex. Q, ¶ 11.

equipment, such as masks and gloves. *E.g.*, Decl. of C. Cowgill, Ex. B, ¶ 19; Decl. of L. Jordan, Ex. C, ¶¶ 12, 14, 15, 18; Decl. of J. Codner, Ex. D, ¶ 5; Decl. of N. Temah, Ex. E, ¶¶ 8–9; Decl. of A. Mendoza, Ex. I, ¶ 9.²⁷ Moreover, only some staff wear masks and gloves, and others, including staff who have direct contact with the detained population, do not wear any protective equipment. *E.g.*, Decl. of V. Alvarez, Ex. L, ¶ 8; Decl. of B. Calero, Ex. M, ¶¶ 10, 14; Decl. of A. Gonzalez, Ex. N, ¶ 9; Decl. of I. Hernandez, Ex. O, ¶ 11; Decl. of M. Sierra, Ex. P, ¶¶ 5, 8; Decl. of A. Linares, Ex. Q, ¶ 13.²⁸ Petitioners also describe instances where individuals who are ill—including those presenting symptoms consistent with COVID-19—are not tested or given adequate medical care. Decl. of C. Cowgill, Ex. B, ¶¶ 13, 18. In fact, only two detained individuals at the Aurora facility have been tested for COVID-19.²⁹

The lack of broader testing is particularly alarming here. There is no dispute that the Aurora facility has already been exposed to COVID-19. Five employees who work at the facility have tested positive for COVID-19,³⁰ and at least one of these employees had direct contact with detained individuals. Decl. of Dr. Franco-Paredes, Ex. A, ¶ 24. ICE’s official guidance on COVID-19 does not state under what conditions detained individuals will be tested. Instead, the only measure ICE

²⁷ See also Decl. of N. Morales, Ex. J, ¶¶ 8, 12–13; Decl. of H. Mendoza, Ex. K, ¶ 14; Decl. of V. Alvarez, Ex. L, ¶¶ 6, 8; Decl. of B. Calero, Ex. M, ¶ 13; Decl. of A. Gonzalez, Ex. N, ¶ 9; Decl. of M. Sierra, Ex. P, ¶ 7; Decl. of A. Linares, Ex. Q, ¶¶ 6, 10.

²⁸ See also Decl. of C. Cowgill, Ex. B, ¶¶ 21, 23; Decl. of L. Jordan, Ex. C, ¶¶ 12, 14, 15, 18; Decl. of J. Codner, Ex. D, ¶ 5; Decl. of A. Mendoza, Ex. I, ¶ 8; Decl. of N. Morales, Ex. J, ¶ 13; Decl. of H. Mendoza, Ex. K, ¶ 14.

²⁹ See ICE Aurora Contract Detention Center Accountability Report Electronic Request (Apr. 6, 2020), available at <https://crow.house.gov/about/ice-accountability-report>. Both detained individuals tested negative.

³⁰ McCormick-Cavanaugh, *supra* n.1.

has committed to taking is to isolate detained persons with fever and/or respiratory symptoms who meet CDC criteria for epidemiologic risk of exposure to the coronavirus.³¹ But some COVID-19 carriers can be asymptomatic. Decl. of Dr. Franco-Paredes, Ex. A, ¶¶ 8, 22. Without aggressive testing, the spread of infection cannot be prevented. *Id.* ¶¶ 23, 37, 50. The Aurora facility, however, is unable and/or unwilling to conduct the widespread screening of detained individuals, staff and others who enter the facility. *Id.* ¶¶ 37, 50.³²

The Aurora facility is also continuing to allow transfers of new detained individuals who have been living outside the community in areas where COVID-19 is rampant—without any testing for COVID-19. Decl. of C. Cowgill, Ex. B, ¶ 23; Decl. of E. Jordan, Ex. C, ¶¶ 11–12. Public reports confirm at least 276 individuals have been transferred to the facility since March 20, 2020.³³ Given the daily entry of staff and guards from the community, and the continued influx and transfer of new people into the detention facility, it is only a matter of time before the disease becomes widespread. Decl. of Dr. Franco-Paredes, Ex. A, ¶¶ 22–25, 29.

Not only is the Aurora facility failing to take proper precautions to prevent the spread of COVID-19, it is also ill equipped to manage an infectious disease outbreak and care for people in

³¹ *ICE Guidance on COVID-19: Overview & FAQs*, U.S. Immigr. & Customs Enforcement, <https://www.ice.gov/coronavirus> (last visited Apr. 13, 2020).

³² Governor Jared Polis has extended Colorado’s statewide stay-at-home order through April 26, 2020, in part because the state is without the testing supplies needed for mass testing and effective containment and the only option is to severely limit the number of person-to-person interactions. See Michael Sakas & Alex Scoville, *Gov. Polis Extends Colorado Stay At Home Order Through April 26, Encourages Coloradans To Cheer Healthcare Workers*, CPR News (Apr. 6, 2020), <https://www.cpr.org/2020/04/06/watch-gov-jared-polis-colorado-coronavirus-statewide-address/>.

³³ ICE Aurora Contract Detention Center Accountability Report Electronic Requests (Mar. 25, Mar. 30, & Apr. 6, 2020), available at <https://crow.house.gov/about/ice-accountability-report>.

custody. The facility has very limited higher-level medical care and on-site medical facilities. Decl. of E. Jordan, Ex. C, ¶¶ 6, 9. The facility has only one doctor on staff to serve the over 500 detained individuals currently residing there. *Id.* ¶ 6. As a result, individuals at the facility are most frequently treated by nurses, who have a history of providing insufficient medical care. *Id.* ¶ 7; *see also* Decl. of C. Cowgill, Ex. B, ¶ 16. Upon information and belief, there are no isolation cells or dedicated medical areas with proper infrastructure or equipment in at least some parts of the Aurora facility, such as the housing unit known as “Aurora South.” Decl. of E. Jordan, Ex. C, ¶ 9. The Aurora facility is thus unprepared to protect people in custody against a life-threatening illness.

IV. Public Health Experts Have Concluded That People Vulnerable To COVID-19 Should Be Released From ICE Detention.

Because of the severity of the threat posed by COVID-19, and its potential to rapidly spread throughout a detention setting, public health experts have recommended the release of individuals from immigration detention. Dr. Franco-Paredes concludes that “releasing those in the high risk age groups and those with underlying medical conditions will lessen the impact of an outbreak of COVID-19,” primarily because those groups “carry the highest concentration of virus in their respiratory secretions and act as human incubators of the virus.” Decl. of Dr. Franco-Paredes, Ex. A, ¶ 52. Thus, releasing the most vulnerable people, such as Petitioners, is likely to reduce the burden on regional hospitals and health centers.

Denver Health, a facility with a capacity of 555 beds, is currently the only hospital that accepts patients from Aurora facility. *Id.* ¶ 33. Dr. Franco-Paredes has concluded that a large outbreak at the Aurora facility “would put a tremendous strain on the medical system in Colorado at the detriment of all patients” because facilities like Denver Health would bear the brunt of having to

treat infected individuals from Aurora and would have fewer medical resources available for the general population. *Id.*

As stated above, DHS medical experts have also recommended the release of vulnerable people from ICE custody to protect the health of detained individuals and the greater public. In a whistleblower letter to Congress, Drs. Allen and Rich recommended that “[m]inimally, DHS should consider releasing all detainees in high risk medical groups such as older people and those with chronic diseases;” they concluded that “acting immediately[] will save lives of not only those detained, but also detention staff and their families, and the community-at-large.”³⁴ Government officials around the country have recognized the threat posed by COVID-19 to detained and incarcerated populations and have limited arrests or released individuals for that reason. For example, the Governor of Colorado has recognized that the detained population is at an increased risk during the pandemic. He accordingly issued guidance encouraging state law enforcement to issue citations and summons rather than arrests when possible to reduce the risk of outbreaks in the state jail population.³⁵ Meanwhile, jail administrators in Jefferson County, Colorado;³⁶

³⁴ DHS Expert Letter, *supra* n.14, at 6.

³⁵ John Herrick, *Gov. Jared Polis Calls on Law Enforcement to Reduce Arrests During Pandemic*, Colo. Indep. (Mar. 25, 2020), <https://www.coloradoindependent.com/2020/03/25/polis-arrests-jail-covid-19/>.

³⁶ Jenna Carroll, *Inmates Being Released Early From JeffCo Detention Facility Amid Coronavirus Concerns*, KDVR Colo. (Mar. 19, 2020), <https://kdvr.com/news/coronavirus/inmates-being-released-early-from-jeffco-detention-facility-amid-coronavirus-concerns/>.

Cuyahoga County, Ohio;³⁷ Los Angeles, California;³⁸ and San Francisco, California,³⁹ among others, have released inmates in an effort to curb the spread of COVID-19. Yet today, Respondents continue to hold over 500 individuals in detention at the Aurora facility, including at-risk Petitioners in this action, despite the ready availability of community-based alternatives. Without this Court’s intervention, the Petitioners continue to be at imminent risk of severe illness or death.

LEGAL STANDARD

Under Rule 65 of the Federal Rules of Civil Procedure, a movant is entitled to a temporary restraining order by showing: (i) they will suffer irreparable harm unless the injunction is issued; (ii) they have a substantial likelihood of prevailing on the merits; (iii) the threatened injury outweighs any harm that the preliminary injunction may cause the opposing party; and (iv) the injunction will not adversely affect the public interest. *Diné Citizens Against Ruining Our Env’t v. Jewell*, 839 F.3d 1276, 1281 (10th Cir. 2016). Where an injunction alters the status quo—here, Petitioners’ release from detention—movants must “make a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms.” *Free the Nipple-Fort Collins v. City of Fort Collins, Colorado*, 237 F. Supp. 3d 1126, 1130 (D. Colo. 2017), *aff’d*, 916 F.3d 792 (10th Cir. 2019)

³⁷ Scott Noll & Camryn Justice, *Cuyahoga County Jail Releases Hundreds of Low-Level Offenders to Prepare for Coronavirus Pandemic*, News 5 Cleveland (Mar. 20, 2020), <https://www.news5cleveland.com/news/local-news/oh-cuyahoga/cuyahoga-county-jail-releases-hundreds-of-low-level-offenders-to-prepare-for-coronavirus-pandemic>.

³⁸ Alene Tchekmedyan, *More L.A. County Jail Inmates Released Over Fears of Coronavirus Outbreak*, L.A. Times (Mar. 19, 2020), <https://www.latimes.com/california/story/2020-03-19/la-jails-coronavirus-sheriffs-department>.

³⁹ Megan Cassidy, *Alameda County Releases 250 Jail Inmates Amid Coronavirus Concerns, SF to Release 26*, S.F. Chron. (Mar. 20, 2020), <https://www.sfchronicle.com/crime/article/Alameda-County-releases-250-jail-inmates-amid-15147332.php>.

(quotation omitted). The Court likewise has independent authority under habeas corpus, 28 U.S.C. § 2241, to order the immediate release of detained persons from unconstitutional confinement.

ARGUMENT

I. Petitioners Will Suffer Irreparable Harm In The Absence Of A Temporary Restraining Order.

Petitioners will suffer irreparable harm if they are not immediately released. In the Tenth Circuit, a petitioner-plaintiff satisfies the irreparable harm requirement by “show[ing] that the injury complained of is of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm.” *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003). “An injury must be certain, great, actual and not theoretical” in order to constitute irreparable harm. *Id.* “Irreparable harm, as the name suggests, is harm that cannot be undone, such as by an award of compensatory damages or otherwise.” *Salt Lake Tribune Publ’g Co., LLC v. AT & T Corp.*, 320 F.3d 1081, 1105 (10th Cir. 2003).

Without emergency relief from this Court, Petitioners face an imminent threat of substantial harm caused by COVID-19. Because of their medical conditions, Petitioners are at much higher risk of serious illness or death due to COVID-19 than the general population. Decl. of Dr. Franco-Paredes, Ex. A, ¶¶ 39–45.⁴⁰ Ms. Hamzic, for example, is over 50 and suffers from several diagnosed chronic conditions, including diabetes, asthma and high blood pressure, and she only has one lung. Decl. of S. Hamzic, Ex. G, ¶¶ 1,3. She faces imminent risk of serious illness or death, a harm no court can possibly undo. *See, e.g., Harris v. Bd. of Supervisors*, 366 F.3d 754, 766 (9th Cir. 2004) (holding that “pain, infection, amputation, medical complications, and death due to delayed

⁴⁰ *See also* CDC Risk Factors.

treatment” constitute irreparable harm); *Williams v. Chrans*, 50 F.3d 1363, 1364 (7th Cir. 1995) (per curiam) (“In this case, as in all death cases, there is no question of irreparable injury.”); *Harrison ex rel. Harrison v. Phillips*, 395 F. Supp. 3d 800, 814 (N.D. Tex. 2019) (“Harrison’s doctors unanimously state that Harrison is at risk of death . . . and it goes without saying that Harrison’s death would be irreparable.”).

Short of death, Petitioners are at risk of lifelong ailments should they contract COVID-19 and survive, including neurologic damage and the loss of respiratory capacity that may require extensive rehabilitation. Decl. of Dr. Franco-Paredes, Ex. A, ¶¶ 10, 12. The imminent threat of potentially lifelong medical complications also satisfies the irreparable harm requirement. *See, e.g., Edmisten v. Werholtz*, 287 F. App’x 728, 734 (10th Cir. 2008) (holding evidence demonstrated plaintiff’s health would deteriorate irreparably absent urgent medical intervention); *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 332 (2d Cir. 1995) (upholding finding of irreparable injury “premised . . . upon [the district court’s] finding that [petitioner] was subject to risk of injury, infection, and humiliation”); *see also Unknown Parties v. Johnson*, No. CV-15-00250-TUC-DBC, 2016 WL 8188563, at *15 (D. Ariz. Nov. 18, 2016), *aff’d sub nom Doe v. Kelly*, 878 F.3d 710 (9th Cir. 2017) (finding irreparable harm where evidence demonstrated “medical risks associated with . . . being exposed to communicable diseases”).

Petitioners further satisfy the requirement to demonstrate irreparable harm because Defendants have violated their constitutional rights. *Free the Nipple*, 237 F. Supp. 3d at 1134 (“[A]ny infringement of one’s constitutional rights inflicts an irreparable injury.”); *Bravo Castillo v. Barr*, No. 5:20-cv-00605-TJH-AFM, ECF No. 32, slip op. at 6 (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”). Defendants have deprived Petitioners of their right to due process by continuing to detain them, despite being ill equipped to adequately protect them from COVID-19. *See infra* Section II.

Petitioners’ continued detention at the Aurora facility threatens them with both serious, irreparable bodily injury and the ongoing violation of their constitutional rights. This grave harm can only be prevented if the Court orders Petitioners be immediately released from the Aurora facility.

II. Petitioners Have A Substantial Likelihood Of Prevailing On Their Due Process Claims.

Petitioners are likely to succeed on their claims that Defendants’ refusal to provide them adequate protection from COVID-19 or to release them from custody violates their constitutional due process rights under the Fifth Amendment.

A. Petitioners’ Continued Detention Violates Their Due Process Right To Protection From Harm Because It Constitutes Impermissible Punishment.

When the government 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). Failure to provide for those human needs “transgresses the substantive limits on state action” set by the Due Process Clause and Eighth Amendment. *Id.*; accord *Schwartz v. Booker*, 702 F.3d 573, 579–80 (10th Cir. 2012).

The Due Process Clause of the Fifth Amendment forbids the government from depriving a person of life, liberty or property without due process of law. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Persons in immigration detention are not criminally detained, so their constitutional protections are derived from the Fifth Amendment. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

“Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects.” *Id.* at 690.

The Eighth Amendment, which applies to persons convicted of criminal offenses, allows punishment as long as it is not cruel and unusual, but the Fifth Amendment’s due process protections do not allow punishment at all. *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979) (“Due process requires that a pretrial detainee not be punished.”); *Colbruno v. Kessler*, 928 F.3d 1155, 1162 (10th Cir. 2019). 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 v. Romeo*, 457 U.S. 307, 322 (1982).

A detained person can establish a due process violation by providing “evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose.” *Colbruno*, 928 F.3d at 1163 (citing *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473–74 (2015)); *see also Bell v. Wolfish*, 441 U.S. 520, 539 (2015) (holding that, if a condition of civil detention “is not reasonably related to a legitimate goal” or if it is “excessive” in relation to a legitimate goal, “a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees”). Even if government interests are nonpunitive and reasonably related to a legitimate goal, they can nevertheless be deemed excessive, particularly if viable alternatives exist. *Bell*, 441 U.S. at 539 n.20. Here, the conditions at the Aurora facility fail to provide adequate protections against COVID-19 and serve no legitimate government purpose.

Despite the Aurora facility’s known exposure to COVID-19, the Aurora facility does not provide necessary screening and testing practices. Decl. of Dr. Franco-Paredes, Ex. A, ¶ 50.

Petitioners cannot engage in the six feet of physical distancing recommended by the CDC. *Id.* ¶¶ 18, 47, 51. In fact, many detained individuals report that they are being instructed to maintain three feet of distance from other people because there is not enough room to maintain six feet of distance. Decl. of C. Cowgill, Ex. B, ¶ 20. Petitioners are also detained in unhygienic conditions. They have limited or no access to hand sanitizer, masks or gloves. *E.g.*, Decl. of C. Cowgill, Ex. B, ¶ 19; Decl. of L. Jordan, Ex. C, ¶¶ 12, 14, 15, 18; Decl. of J. Codner, Ex. D, ¶ 5; Decl. of N. Temah, Ex. E, ¶¶ 8–9; Decl. of A. Mendoza, Ex. I, ¶ 9; Decl. of N. Morales, Ex. J, ¶8; Decl. of H. Mendoza, Ex. K, ¶ 14; Decl. of V. Alvarez, Ex. L, ¶¶ 6, 8; Decl. of B. Calero, Ex. M, ¶ 13; Decl. of A. Gonzalez, Ex. N, ¶ 9; Decl. of M. Sierra, Ex. P, ¶ 7; Decl. of A. Linares, Ex. Q, ¶10. And, despite the documented presence of COVID-19 in the Aurora facility, many staff, including staff who have direct contact with detained individuals, do not wear any protective equipment, exacerbating the risk to Petitioners. Decl. of C. Cowgill, Ex. B, ¶¶ 21, 23; Decl. of L. Jordan, Ex. C, ¶¶ 12, 14, 15, 18; Decl. of J. Codner, Ex. D, ¶ 5; Decl. of A. Mendoza, Ex. I, ¶ 8; Decl. of H. Mendoza, Ex. K, ¶ 14; Decl. of V. Alvarez, Ex. L, ¶ 8; Decl. of B. Calero, Ex. M, ¶¶ 10, 14; Decl. of A. Gonzalez, Ex. N, ¶ 9; Decl. of I. Hernandez, Ex. O, ¶ 11; Decl. of M. Sierra, Ex. P, ¶¶ 5, 8; Decl. of A. Linares, Ex. Q, ¶13. Petitioners cannot protect themselves given the conditions at the Aurora facility.

These unhygienic conditions serve no legitimate government objective. Enforcement of the nation’s immigration laws does not require subjecting immigrants to detention under unsafe and unhygienic conditions that contravene public health officials’ requirements, guidelines and standards. Ample medical evidence demonstrates that physical distancing is the only way to avoid COVID-19. Decl. of Dr. Franco-Paredes, Ex. A, ¶¶ 18, 49. Keeping at-risk Petitioners detained in such close proximity to one another and without testing or screening or the sanitation necessary to combat

the spread of the virus is “not rationally related to a legitimate governmental objective,” *Colbruno*, 928 F.3d at 1163, and thus constitutes illegitimate punishment in violation of Petitioners’ due process rights.

Even if detention under these circumstances could plausibly be considered to be related to ICE’s interest in enforcing immigration laws—and, as explained below, it cannot—it would clearly be excessive in relation to that purpose. Once Petitioners are exposed to the virus, they are all vulnerable to severe illness or death because of their underlying medical conditions, including: asthma, HIV, heart conditions, hypertension and diabetes. Continued detention of Petitioners is an imminent threat to their lives that is excessive in relation to any purported government goal and therefore amounts to punishment.

ICE has a number of tools available beyond physical detention to meet its enforcement goals, including supervised or conditional release.⁴¹ Indeed, ICE routinely exercises its authority to release particularly vulnerable detained persons from the Aurora facility and other immigration detention facilities.⁴² Similarly, federal district courts throughout the United States have also ordered the release of detained individuals in federal custody in the wake of the COVID-19 crisis. *See, e.g., Thakker v. Doll*, No. 1:20-cv-00480-JEJ, ECF No. 47, slip op. at 24 (M.D. Pa. Mar. 31, 2020) (ordering release of people from three immigration detention facilities in Pennsylvania that were

⁴¹ *See, e.g.*, U.S. Gov’t Accountability Office, *Immigration: Progress and Challenges in the Management of Immigration Courts and Alternatives to Detention Program* (2018), available at <https://www.gao.gov/products/GAO18-701T>; U.S. Gov’t Accountability Office, *Alternatives To Detention: Improved Data Collection and Analyses Needed to Better Assess Program Effectiveness* (2014), available at <https://www.gao.gov/products/GAO-15-26>.

⁴² *See* Kevin Beaty, *Immigrants Released from the Aurora Prison After COVID Case Confirmed*, Denverite (Mar. 27, 2020), <https://denverite.com/2020/03/27/immigrants-released-from-the-aurora-prison-after-covid-case-confirmed/>.

“plainly not equipped to protect [p]etitioners from a potentially fatal exposure to COVID-19”); *Basank v. Decker*, No. 1:20-cv-02518-AT, ECF No. 11, slip op. at 13 (S.D.N.Y. Mar. 26, 2020) (ordering the release of ten people from three immigration detention facilities in New Jersey because “confining vulnerable individuals . . . without enforcement of appropriate social distancing and without specific measures to protect their delicate health ‘pose[s] an unreasonable risk of serious damage to [their] future health’” (internal citation omitted)).⁴³ ICE’s objectives with regard to immigration law enforcement “could be accomplished in so many alternative and less harsh methods” than physical detention under conditions such as those presented here. *See Bell*, 441 U.S. at 539 n.20.

Accordingly, Petitioners have a substantial likelihood of prevailing on their claim that continued detention at the Aurora facility constitutes unconstitutional punishment.

B. Continued Detention Constitutes Deliberate Indifference To A Substantial Risk Of Serious Harm To Petitioners.

Petitioners are also likely to succeed in demonstrating that Defendants’ deliberate indifference to their health and safety needs violates the Eighth Amendment’s prohibition on cruel and unusual punishment in contravention of their due process rights.

The due process rights of those in civil detention such as immigration detention “are *at least as great* as the Eighth Amendment protections available to a convicted prisoner.” *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983) (emphasis added). Thus, any condition or treatment that violates the Eighth Amendment rights of individuals who are in prison

⁴³ *See also* orders provided at Ex. S.

necessarily amounts to a violation of the constitutional due process rights of civilly detained individuals, such as Petitioners.

Individuals subject to civil detention can establish a due process violation by demonstrating that the official has acted with “deliberate indifference to [a detained person’s] serious medical needs.” *McCowan v. Morales*, 945 F.3d 1276, 1290 (10th Cir. 2019) (citation omitted). Courts find deliberate indifference when a detained person can show that (1) the conditions were “sufficiently serious so as to deprive [him] of the minimal civilized measure of life’s necessities,” or in the alternative that “a condition [is] sufficiently serious so as [to] constitute a substantial risk of serious harm,” *Shannon v. Graves*, 257 F.3d 1164, 1167 (10th Cir. 2001) (quotation omitted); and (2) defendants knew of and disregarded that substantial risk to plaintiff’s health or safety. *Farmer v. Brennan*, 511 U.S. 825, 834, 837-38 (1994); *Burke v. Regalado*, 935 F.3d 960, 992 (10th Cir. 2019).

Leaving those in custody in the path of infectious disease violates the Eighth Amendment. The Supreme Court has recognized that the government violates the Eighth Amendment when it crowds incarcerated people into cells with others who have “infectious maladies,” “even though the possible infection might not affect all of those exposed.” *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (citing *Hutto v. Finney*, 437 U.S. 678, 682 (1978)). Likewise, the Tenth Circuit has held that a risk of contracting “infectious diseases such as Hepatitis A, shigella, and others” can satisfy the substantial risk of serious harm prong and that “[t]here is no requirement that an inmate suffer serious medical problems before the condition is actionable.” *Shannon*, 257 F.3d at 1168. Where a risk is obvious, such as during a contagious disease outbreak, it is fair for a factfinder to assume

that the government official was aware of the risk. *See, e.g., Farmer v. Brennan*, 511 U.S. 825, 842 (1994).

Here, there is no question that the risk posed by COVID-19 is “serious” and that Defendants are being deliberately indifferent to that risk. While the risks posed by COVID-19 under the circumstances are fairly obvious given publicly available sources, Petitioners have submitted expert evidence demonstrating the seriousness of the risk COVID-19 poses to Petitioners if they remain in the Aurora facility. *See* Decl. of Dr. Franco-Paredes, Ex. A, ¶¶ 39–45, 52. COVID-19 is highly contagious and can cause severe health problems and death, especially in vulnerable persons. *See Id.* ¶¶ 9, 15. Moreover, there are already five reported COVID-19 cases among employees who work at the Aurora facility.⁴⁴ Petitioners in this case are at specific and heightened risk because of their age and/or underlying health conditions. *See supra* Factual Background, Section II.

Defendants are also aware of the serious risks that COVID-19 poses in detention settings, especially for persons over 50 and/or with underlying medical conditions. Attorneys for immigrants detained at the Aurora facility and advocacy groups have notified Defendants about the threat posed by COVID-19 in the Aurora facility.⁴⁵ Medical experts for DHS have specifically identified the risk of COVID-19 spreading to ICE detention centers.⁴⁶ Courts around the country

⁴⁴ McCormick-Cavanaugh, *supra* n.1.

⁴⁵ *See, e.g.,* Beaty, *supra* n.41.

⁴⁶ *See generally* DHS Expert Letter, *supra* n.14.

are already releasing non-violent individuals detained for immigration and/or criminal purposes from detention centers, jails and prisons because the risk of contagion is overwhelming.⁴⁷

In short, the evidence shows that COVID-19 poses a serious risk and that Defendants are aware of the risk both from direct notice and from circumstantial evidence that the risk is entirely obvious. Defendants' failure to release detained individuals from these conditions is deliberate indifference to that risk, in violation of Petitioners' constitutional rights. Petitioners are likely to succeed on the merits of their due process claims.

III. The Balance Of Harms And The Public Interest Weigh In Petitioners' Favor.

Where, as here, the Government is a party to a case, the third and fourth injunction

⁴⁷ See *supra* n.35–28; Ex. S; see also *United States v. Meekins*, No. 1:18-cr-222-APM, ECF No. 75 (D.D.C. Mar. 31, 2020) (post-plea, pre-sentence release order releasing defendant with three pending assault charges due to extraordinary danger COVID-19 poses to people in detention); *United States v. Muniz*, No. 4:09-cr-199, ECF No. 578, slip op. at 2 (S.D. Tex. Mar. 30, 2020) (releasing defendant serving 188-month sentence for drug conspiracy in light of vulnerability to COVID-19: “[W]hile the Court is aware of the measures taken by the Federal Bureau of Prisons, news reports of the virus’s spread in detention centers within the United States and beyond our borders in China and Iran demonstrate that individuals housed within our prison systems nonetheless remain particularly vulnerable to infection.”); *United States v. Grobman*, No. 18-cr-20989, ECF No. 397, slip op. at 2 (S.D. Fla. Mar. 29, 2020) (releasing defendant convicted after trial of fraud scheme in light of “extraordinary situation of a medically-compromised detainee being housed at a detention center where it is difficult, if not impossible, for [the defendant] and others to practice the social distancing measures which government, public health and medical officials all advocate”); *United States v. Mclean*, No. 19-cr-380, ECF. No. 21, slip op. at 1 (D.D.C. Mar. 28, 2020) (“As counsel for the Defendant candidly concedes, the facts and evidence that the Court previously weighed in concluding that Defendant posed a danger to the community have not changed - with one exception. That one exception - COVID-19 - however, not only rebuts the statutory presumption of dangerousness, see 18 U.S.C. § 3142(e), but tilts the balance in favor of release.”); *United States v. Harris*, No. 19-cr-356, ECF No. 35, slip op. at 1 (D.D.C. Mar. 26, 2020) (“The Court is convinced that incarcerating Defendant while the current COVID-19 crisis continues to expand poses a far greater risk to community safety than the risk posed by Defendant’s release to home confinement on . . . strict conditions.”) (collectively, Ex. T).

factors—the balance of the equities and the public interest—merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009); *Bd. of Cty. Commissioners of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, No. 18-CV-01672-WJM-SKC, 2019 WL 4926764, at *7 (D. Colo. Oct. 7, 2019).

The balance of harms and public interest both tilt strongly in Petitioners’ favor. As the Tenth Circuit has recognized, “[w]hen a constitutional right hangs in the balance,” it “usually trumps any harm to the defendant.” *Free the Nipple*, 916 F.3d at 806; *cf. Awad v. Ziriya*, 670 F.3d 1111, 1131 (10th Cir. 2012) (“[W]hen the law that voters wish to enact is likely unconstitutional, their interests do not outweigh [a Petitioner’s interest] in having his constitutional rights protected.”). Petitioners seek to avoid the irreparable harm that they will suffer if they continue to be detained in violation of their constitutional rights, in a jail-like environment where they face an elevated risk of suffering and death from COVID-19. The harm to the government if Petitioners are released, when it can readily impose alternative conditions, is purely administrative.

The potential harm to the government is minimal. There are community-based alternatives to detention, such as release on conditions or on bond, that are readily available to the government. Petitioners understand that the only way for them to remain in the United States is to appear at all their court hearings and comply with any additional release requirements imposed by the government. *See, e.g.*, Decl. of J. Codner, Ex. D, ¶ 4; Decl. of N. Temah, Ex. E, ¶ 12; Decl. of M. Belliard, Ex. F, ¶ 4; Decl. of S. Hamzic, Ex. G, ¶ 5.⁴⁸ Petitioners are also working directly with the Social Service Project at the Rocky Mountain Immigrant Advocacy Network (RMIAN) to

⁴⁸ *See also* Decl. of R. Mora, Ex. H, ¶ 6; Decl. of A. Mendoza, Ex. I, ¶ 6; Decl. of N. Morales, Ex. J, ¶ 2; Decl. of H. Mendoza, Ex. K, ¶ 8; Decl. of V. Alvarez, Ex. L, ¶ 4; Decl. of B. Calero, Ex. M, ¶ 6; Decl. of A. Gonzalez, Ex. N, ¶ 6; Decl. of I. Hernandez, Ex. O, ¶ 5; Decl. of M. Sierra, Ex. P, ¶ 2; Decl. of A. Linares, Ex. Q, ¶ 3.

ensure that, following release from detention, they have access to safe housing and needed services and support with compliance at immigration court appearances. *See generally* Decls. of M. Hope, C. Schlosser, and K. Valentin, Exs. R–R5. Thus, the harm to Petitioners “trumps” any harm to the government. *Free the Nipple*, 916 F.3d at 806.

Similarly, the public interest weighs in favor of granting Petitioners’ relief. It is “always in the public interest to prevent the violation of a party’s constitutional rights.” *Free the Nipple*, 237 F. Supp. 3d at 1134 (quoting *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998); *Strawser v. Strange*, 44 F.Supp.3d 1206, 1210 (S.D. Ala. 2015)). *See also Adams ex rel. Adams v. Baker*, 919 F. Supp. 1496, 1505 (D. Kan. 1996) (“The public interest would best be served by enjoining the defendants from infringing on the plaintiff’s right to equal protection.”). In addition, an injunction would protect public health and safety, considerations that weigh heavily in favor of an injunction. *See United States v. Power Eng’g Co.*, 10 F. Supp. 2d 1145, 1165 (D. Colo. 1998), *aff’d*, 191 F.3d 1224 (10th Cir. 1999) (finding injunction served the public interest where groundwater contamination was a “threat” to the public). *See also Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 472 (5th Cir. 2017) (recognizing public interest in safeguarding access to health care); *Pashby v. Delia*, 709 F.3d 307, 331 (4th Cir. 2013) (“the public interest in this case lies with safeguarding public health”).

Petitioners’ release will serve public health goals. Reducing the detained population will protect “local hospital systems [from] becom[ing] overwhelmed by the patient flow from detention center outbreaks,” thereby saving precious health resources for the broader community.⁴⁹ And upon

⁴⁹ Shoichet, *supra* n.2.

release, Petitioners intend, and will be readily able, to adhere to recommended prevention guidelines regarding COVID-19 transmission. *See, e.g.*, Decl. of M. Hope, Ex. R (M. Belliard plan), ¶ 11; Decl. of M. Hope, Ex. R1 (R. Mora plan), ¶ 4; Decl. of C. Schlosser, Ex. R3 (Temah plan), ¶ 5; Decl. of K. Valentin, Ex. R4 (S. Hamzic plan), ¶ 5 (describing post-release plans for specific Petitioners).

There being no countervailing government or public interest in Petitioners' continued detention in unsafe conditions, Petitioners make a strong showing that both the balance of harms and the public interest weigh in their favor.

IV. Immediate Release Is The Only Effective Remedy For Petitioners' Unlawful Detention.

This Court has authority under 28 U.S.C. § 2241 and Rule 65 to issue the release of Petitioners from detention. Habeas authorizes remedies for unlawful placement or conditions of detention. *See Wilwording v. Swenson*, 404 U.S. 249, 251 (1971) (finding that habeas challenging “living conditions and disciplinary measures” is “cognizable in federal habeas corpus”); *Aamer v. Obama*, 742 F.3d 1023, 1031–38 (D.C. Cir. 2014) (surveying Supreme Court and appellate case law to conclude that “habeas corpus tests not only the fact but also the form of detention”). Habeas also grants 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 . . . initiative and flexibility.” *Harris v. Nelson*, 394 U.S. 286, 291 (1969). 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).

In the midst of this unprecedented public health crisis, numerous other courts considering the plight of detained individuals have ordered release. *See* cases cited *supra* Introduction at 4.

As described in detail above, the Aurora facility is ill equipped to protect Petitioners from contracting COVID-19 and the numerous health complications that could arise if they were to become infected. The Aurora facility is not adhering to CDC recommendations to prevent the spread of the virus, nor is it capable of doing so. Under these circumstances, Petitioners' immediate release is warranted.

V. The Court Should Not Require Petitioners 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.” However, Rule 65(c) invests the district court with discretion as to the amount of security required, if any. *Winnebago Tribe of Nebraska v. Stovall*, 341 F.3d 1202, 1206 (10th Cir. 2003) (“[W]e have previously held that a trial court has ‘wide discretion’ under Rule 65(c) in determining whether to require security.” (quoting *Cont’l Oil Co. v. Frontier Ref. Co.*, 338 F.2d 780, 782 (10th Cir. 1964))).

District courts routinely exercise this discretion to require no security in cases brought by indigent and/or incarcerated people. *See, e.g., Brown v. Callahan*, 979 F. Supp. 1357, 1363 (D. Kan. 1997) (granting motion to waive security requirement for preliminary injunction because “court presumes that [petitioner] would be unable to provide security” as he is proceeding *in forma pauperis* in the action); *Henton v. Albuquerque Hous. Auth.*, No. CIV 13-133 JP/KBM, 2013 WL 8115422, at *1 (D.N.M. Mar. 7, 2013) (“Because it is undisputed that [petitioner] is indigent,

good cause exists for waiving posting of bond or security.”); *see also Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999) (upholding district court’s requirement that Petitioners post only a nominal bond because “while they had not made a showing of indigency, the vast majority of aliens were very poor”). Because Petitioners are currently civilly detained at the Aurora facility and are represented by *pro bono* counsel, good cause exists to waive Rule 65’s security requirement.

CONCLUSION

For the foregoing reasons, Petitioners 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/ Timothy R. Macdonald

Timothy R. Macdonald

Adrienne D. Boyd

Kathleen K. Custer

Sarah Grey

ARNOLD & PORTER KAYE SCHOLER LLP

1144 Fifteenth Street

Suite 3100

Denver, CO 80202-2569

Phone: (303) 863-1000

Timothy.Macdonald@arnoldporter.com

Sarah.Grey@arnoldporter.com

Kathleen.Custer@arnoldporter.com

Adrienne.Boyd@arnoldporter.com

And

Sirine Shebaya

Khaled Alrabe* (*admission pending*)

Amber Qureshi

NATIONAL IMMIGRATION PROJECT OF

THE NATIONAL LAWYERS GUILD

2201 Wisconsin Ave NW

Suite 200

Washington, DC 20007

Telephone: (617) 227-9727

sirine@nipnl.org
khaled@nipnl.org
amber@nipnl.org

And

Laura Lunn
**ROCKY MOUNTAIN IMMIGRANT
ADVOCACY NETWORK**
7301 Federal Blvd.
Suite 300
Westminster, CO 80030
Telephone: (303) 433-2812
llunn@rmian.org

CERTIFICATION OF LOCAL CIVIL RULE 65.1

Counsel for Petitioners certify that they have served a copy of this Motion and all accompanying exhibits by certified mail to the individuals provided on the Certificate of Service. Counsel for Petitioners further certify that all documents in this action have been filed via CM/ECF. This Motion is therefore made with notice.

CERTIFICATE OF SERVICE

I, Timothy R. Macdonald, hereby certify that on April 14, 2020, I filed the foregoing with the Clerk of the Court using the CM/ECF system, and I hereby certify that I have mailed a hard copy of the documents to the individuals identified below pursuant to Fed.R.Civ.P. 4 via certified mail on April 14, 2020.

Jason Dunn
United States Attorney
U.S. Attorney's Office
District of Colorado
1801 California Street, Ste. 1600
Denver, CO 80202

William Barr
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

And to: John Fabbriatore; Matthew Albence, and DHS/ICE, c/o:

Office of the General Counsel
U.S. Department of Homeland Security
2707 Martin Luther King Jr. Ave, SE
Washington, D.C. 20528-0485

And to:

Johnny Choate
GEO Group, Inc.
Aurora ICE Processing Center
3130 N. Oakland Street
Aurora, CO 80010

/s/ Timothy R. Macdonald
Timothy R. Macdonald
ARNOLD & PORTER KAYE SCHOLER LLP

Pro Bono Counsel for Petitioners