

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION**

WILLIAMS, *et al.*,

Petitioners-Plaintiffs,

v.

HORTON, *et al.*,

Respondents-Defendants.

No. 4:20-cv-304-AKK-JHE

ORAL ARGUMENT REQUESTED

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

INTRODUCTION

Today's COVID-19 pandemic is the worst the world has seen since 1918. Public health experts have admonished that the only effective way to reduce the risk of contagion is sustained social distancing and vigilant hygiene. Such measures are impossible to achieve in crowded detention centers. For this reason, health care professionals – including two of the Department of Homeland Security's own medical experts – have urgently called for the release of detained immigrants, particularly elderly or medically vulnerable ones.¹ Yet, Respondents-Defendants (Defendants) continue to confine over one hundred individuals in immigration custody in the Etowah County Detention Center (ECDC), including those at severe risk of severe illness or death, despite the ready availability of release, including on community-based alternatives to detention. Ignoring these warnings, ICE's Acting Director recently told Congress that it will no longer release individuals – even those at high risk for serious injury or death – because doing so could give the impression that the Trump Administration is “not enforcing our immigration laws.”²

¹ Catherine E. 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>.

² HOUSE COMM. ON OVERSIGHT AND REFORM, *DHS Officials Refuse to Release Asylum Seekers and Other Non-Violent Detainees Despite Spread of Coronavirus* (Apr. 17, 2020), <https://oversight.house.gov/news/press-releases/dhs-officials-refuse-to-release-asylum-seekers-and-other-non-violent-detainees>

Petitioners-Plaintiffs (Plaintiffs) are eighteen individuals detained in the custody of U.S. Immigration and Customs Enforcement (ICE) in ECDC who, due to their age and preexisting medical conditions, are particularly vulnerable to serious illness or death if infected by the novel coronavirus that causes COVID-19. While imprisoned, it will be impossible for them to engage in necessary social distancing and personal hygiene practices to protect themselves and others. They are vulnerable to infection as they eat, sleep, and otherwise commingle in tight proximity to others, and because conditions in the jail are notoriously unsanitary, lacking sufficient supplies of soap, hand sanitizer, cleaning materials and personal protective equipment, and access to adequate nutrition and medical care.

Even with the measures Defendants are implementing to limit the spread of COVID-19, immigration detention centers and local jails are a hotbed for spread of the virus, which broadly endangers public health, will strain vulnerable hospital systems, and exposes persons in civil detention such as Plaintiffs to conditions that constitute unlawful punishment in violation of due process. Without this Court's intervention, these especially vulnerable Plaintiffs will continue to face the imminent risk of severe illness or death. Release under appropriate conditions is the only meaningful way to protect Plaintiffs from grave, irreparable harm, and this Court, like many others who have already acted, is authorized to order it.

FACTUAL BACKGROUND

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

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

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

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

³ CENTERS FOR DISEASE CONTROL AND PREVENTION, *Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19)* (revised Apr. 3, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html>.

Older individuals and those with certain medical conditions face greater chances of serious illness or death from COVID-19. *Id.* ¶ 21; Ex. 20, Declaration of Dr. Ellen Eaton ¶ 26. These conditions include lung disease (including asthma), liver or kidney disease, diabetes, hypertension, compromised immune systems, blood disorders, and cancer. Meyer Decl. ¶ 21; Eaton Decl. ¶ 11. Individuals detained in immigration detention centers, including those at ECDC, are also more susceptible to experiencing complications from infectious diseases than the population at large. Meyer Decl. ¶ 14.

Dr. Ellen Eaton, an infectious disease specialist at the University of Alabama at Birmingham School of Medicine and Branch Director for Special Populations at Jefferson County's COVID-19 Unified Command Services, has specifically determined that each Plaintiff faces a substantial risk of severe illness or death from continued detention. Eaton Decl. ¶ 38. If released from detention, each Plaintiff has a place to reside where they can practice self-isolation and proper hygiene, thus dramatically reducing their risk of injury or death from COVID-19 and alleviating the risk posed to the local jail staff, the surrounding community, and the public at large.

- **Sarail Michael Archilla** suffers from hypertension and chronic asthma, which puts him at heightened risk of severe illness or death if he contracts COVID-19. Eaton Decl. ¶ 38(a). He has a place to live if released. Ex. 2, Archilla Decl. ¶ 13.

- **Maxime P. Blanc** suffers from pre-diabetes, high cholesterol, and hypertension, which put him at heightened risk of severe illness or death if he contracts COVID-19. Eaton Decl. ¶ 38(b). He has a place to live if released. Ex. 3, Blanc Decl. ¶ 13.
- **Geovanny Gerardo Castellano** is 60 years old and suffers from hypertension and heart disease, which put him at heightened risk of severe illness or death if he contracts COVID-19. Eaton Decl. ¶ 38(c). He has a place to live if released. Ex. 4, Castellano Decl. ¶ 13.
- **Antonio Melquezideth Castro** suffers from a history of chronic kidney disease and lung disease that put him at heightened risk of severe illness or death if he contracts COVID-19. Eaton Decl. ¶ 38(d). He has a place to live if released. Ex. 5, Castro Decl. ¶ 15-16.
- **Edson Flores** suffers from hypertension, high cholesterol, and diabetes, which put him at heightened risk of severe illness or death if he contracts COVID-19. Eaton Decl. ¶ 38(e). He has a place to live if released. Ex. 6, Flores Decl. ¶ 13.
- **Ray Fuller** is 54 years old and suffers from hypertension and cardiopulmonary disease, which put him at heightened risk of severe illness or death if he contracts COVID-19. Eaton Decl. ¶38(f). He has a place to live if released. Ex. 7, Fuller Decl. ¶ 12.
- **Jose Antonio Garcia Rivera** is 62 years old⁴ and also suffers from asthma, which put him at high risk of severe illness or death if he contracts COVID-19. Eaton Decl. ¶38(g). He has a place to live if released. Ex. 8, Garcia Rivera Decl. ¶10.
- **Karim Tahir Golding** suffers from asthma, putting him at heightened risk of severe illness or death if he contracts COVID-19. Eaton Decl. ¶38(h). He has a place to live if released. Ex. 9, Golding Decl. ¶ 12.

⁴ Although ICE alleges that Mr. Garcia Rivera is 56 years old, *see* Corrected Amended Petition and Complaint for Injunctive and Declaratory Relief (Doc. 11) at 12 n.22, even assuming this is correct, his age and medical condition still place him at heightened risk of severe illness or death from COVID-19.

- **Alex Hernandez** suffers from hypertension and other medical complications, which puts him at heightened risk of severe illness or death if he contracts COVID-19. Eaton Decl. ¶ 38(i). He has a place to live if released.
- **Bakhodir Madjitov** suffers from hypertension and a chronic heart condition which causes his heart to beat abnormally slow, as well as other serious but undiagnosed medical conditions, putting him at heightened risk of severe illness or death if he contracts COVID-19. Eaton Decl. ¶ 38(j). He has a place to live if released. Ex. 11, Madjitov Decl. ¶36.
- **Kenneth Manning** is 61 years old and has a history of prostate cancer and heart disease, putting him at heightened risk of severe illness or death if he contracts COVID-19. Eaton Decl. ¶ 38(k). He has a place to live if released. Ex. 12, Manning Decl. ¶10
- [REDACTED] suffers from [REDACTED], putting her at heightened risk of severe illness or death from COVID-19. Eaton Decl. ¶38(l). She has a place to live if released.
- **Tesfa Miller** suffers from hypertension, high cholesterol and chronic bronchitis, putting him at heightened risk of severe illness or death from COVID-19. Eaton Decl. ¶ 38(m). He has a place to live if released. Ex. 14, Miller Decl. ¶13.
- **Allen Roger Olano Esparza** suffers from hypertension, kidney disease, and an irregular thyroid, putting him at heightened risk of severe illness or death if he contracts COVID-19. Eaton Decl. ¶ 38(n). He has a place to live if released. Ex. 15, Olano Esparza Decl. ¶ 12.
- **Sergio Quito** suffers from hypertension and a seizure disorder, putting him at heightened risk of severe illness or death if he contracts COVID-19. Eaton Decl. ¶ 38(o). He has a place to live if released. Ex. 16, Quito Decl. ¶12.
- **Joseph Debonnaire Soho** suffers from hypertension and anemia, putting him at heightened risk of severe illness or death if he contracts COVID-19. Eaton Decl. ¶ 38(p). He has a place to live if released. Ex. 17, Soho Decl. ¶13.
- **Churvin Webster** is 57 years old and suffers from hypertension and asthma, putting him at heightened risk of severe illness or death if he contracts COVID-

19. Eaton Decl. ¶ 38(q). He has a place to live if released. Ex. 18, Webster Decl. ¶11.

- **Randane Williams** suffers from hypertension and a heart murmur, putting him at heightened risk of severe illness or death if he contracts COVID-19. Eaton Decl. ¶38(r). He has a place to live if released. Ex. 1, Williams Decl. ¶14.

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

Etowah County Detention Center is located in Gadsden, Alabama, and holds both ICE detainees and hundreds of county inmates. As of April 28 2020, there were 6,580 COVID-19 cases in Alabama and 241 deaths.⁵ Etowah County, where ECDC is located, has reported 125 confirmed cases and eight deaths as of April 26.⁶ Alabama's healthcare system is entirely underprepared to respond to this public health crisis. Eaton Decl. ¶¶ 17, 19-22. Detention centers, prisons and jails present a particularly high risk of outbreaks, *id.* ¶ 29; Meyer Decl. ¶¶ 7-19, as exemplified by the skyrocketing numbers of cases in Mobile County Metro Jail where a third of those detained were already released,⁷ and in the Oakdale federal prison in Louisiana where seven prisoners have died of the disease and more than

⁵ ALABAMA DEP'T OF PUBLIC HEALTH, DIV. OF INFECTIOUS DISEASES & OUTBREAKS, *COVID-19 in Alabama*, <https://dph1.adph.state.al.us/covid-19/> (last accessed Apr. 28, 2020).

⁶ *Id.*

⁷ Mike Cason, *Mobile County sheriff says 10 jail inmates have COVID-19*, AL.COM (Apr. 15, 2020), <https://www.al.com/news/2020/04/mobile-county-sheriff-says-10-jail-inmates-have-covid-19.html>; Christopher Harress, *Amid COVID-19 pandemic, Mobile Metro Jail releases a third of inmates*, AL.COM (Apr. 10, 2020), <https://www.al.com/news/2020/04/amid-covid-19-pandemic-mobile-metro-jail-releases-a-third-of-inmates.html>.

twenty have tested positive.⁸ The Alabama Department of Corrections saw its first coronavirus-related death earlier this month.⁹

According to a recent modeling study conducted by Brown University, between 72 and nearly 100 percent of individuals in ICE detention are expected to be infected with COVID-19 within 90 days of an infection reaching a facility.¹⁰ The study additionally found that, among the 132 individuals detained at ECDC, between 46 and 117 people will be infected within 30 days of an infection reaching the facility, between 92 and 126 people within 60 days, and between 104 and 126 people within 90 days.¹¹

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. Meyer Decl. ¶¶ 9, 11, 12, 20. But this is impossible at ECDC, Eaton Decl. ¶ 29, and several Plaintiffs describe conditions that render it

⁸ Matt Sledge and Lea Skene, *As death count grows, Louisiana prisons and jails grapple with coronavirus spread*, THE TIMES-PICAYUNE/THE NEW ORLEANS ADVOCATE/NOLA.COM (Apr. 25, 2020), https://www.nola.com/news/coronavirus/article_a261bbb8-8728-11ea-9a1f-6bc823fbc5db.html.

⁹ Eddie Burkhalter, *Alabama inmate died after testing positive for COVID-19. Two others test positive*, ALABAMA POLITICAL REPORTER (Apr. 17, 2020), <https://www.alreporter.com/2020/04/17/alabama-inmate-dies-from-covid-19-two-others-test-positive/>

¹⁰ Michael Irvine, et al., *Modeling COVID-19 and Impacts on U.S. Immigration and Enforcement (ICE) Detention Facilities*, J. OF URBAN HEALTH (forthcoming 2020), https://whistleblower.org/wp-content/uploads/2020/04/Irvine_JUH_ICE_COVID19_model.pdf.

¹¹ *Id.*

impossible to practice social distancing.¹² They share bathrooms and a common recreation and dining area. *Id.* To make matters worse, Defendants have not adopted adequate mitigation measures: jail staff often do not properly wear masks or gloves, and Plaintiffs do not have adequate access to soap and hand sanitizer or personal protective equipment (PPE).¹³ Detained individuals have limited or no access to gloves and only recently received a single mask, to be reused.¹⁴ ECDC staff have provided no – or incorrect – information regarding COVID-19 safety.¹⁵ Individuals who are ill – including those presenting symptoms consistent with COVID-19 – are not tested or given adequate medical care. Eaton Decl. ¶ 33.¹⁶

The absence of systematic testing, the daily entry of staff and contractors from the community, and the continued influx and transfer of dozens of new people into and out of ECDC on a daily or weekly basis¹⁷ make it so that “COVID-19 cases may not be detected until there is already a full-blown outbreak in the jail with multiple individuals experiencing serious illness.” Eaton Decl. ¶ 33.

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

¹² Ex. 10, Hernandez Decl. ¶¶5, 7; Castellano Decl. ¶5; Flores Decl. ¶¶4-5; Fuller Decl. ¶5; Madjitov Decl. ¶¶ 12-13; Manning Decl. ¶¶4, 6; Castro Decl. ¶5; Golding Decl. ¶10; Williams Decl. ¶4.

¹³ Golding Decl. ¶11; Hernandez Decl. ¶ 4; Castellano Decl. ¶ 5; Fuller Decl. ¶ 5.

¹⁴ Castellano Decl. ¶ 5; Fuller Decl. ¶ 5; Madjitov Decl. ¶ 10; Manning Decl. ¶ 6; Castro Decl. ¶ 5; Golding Decl. ¶ 11; Williams Decl. ¶ 5.

¹⁵ Hernandez Decl. ¶ 4; Madjitov Decl. ¶¶ 15, 23, 27; Olano Esparza Decl. ¶ 4

¹⁶ Hernandez Decl. ¶ 6; Madjitov Decl. ¶¶ 18, 27, 28.

¹⁷ *See, e.g.*, Hernandez Decl. ¶¶ 5-6; Madjitov Decl. ¶ 16.

As these conditions show, Defendants have not and cannot ensure mitigation of COVID-19 in ECDC or other ICE detention facilities. Eaton Decl. ¶ 29-36; Ex. 22, Decl. of Susan E. Hassig, MPH, DrPH ¶¶ 5, 10. As of April 21, 2020, ICE had tested only 425 people among the over 32,000 it detains. Of these, 253 tested positive.¹⁸ While ICE’s current policy appears to be to “cohort” those who are at high epidemiologic risk, this is insufficient and even counter-productive: in the absence of adequate distancing within the cohort, additional infections will occur, Hassig Decl. ¶ 9; not everyone who contracts the virus is symptomatic, Eaton Decl. ¶ 33; 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. Eaton Decl. ¶ 35.

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.¹⁹ For example, the PRR urges that facilities “adhere to CDC recommendations for cleaning and disinfection during the COVID-19 response,”²⁰ which in turn urge that “staff and incarcerated/detained people performing cleaning

¹⁸ Associated Press, *Scant Testing in US Migration System Risks Spreading Virus*, N.Y. TIMES (Apr. 17, 2020), <https://www.nytimes.com/aponline/2020/04/17/world/americas/ap-lt-virus-outbreak-deportees.html>.

¹⁹ IMMIG. AND CUSTOMS ENFORCEMENT, ENFORCEMENT AND REMOVAL OPERATIONS, *COVID-19 Pandemic Response Requirements* (Apr. 10, 2020), <https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf>.

²⁰ *Id.* at 9.

wear PPE.”²¹ However, detained people at ECDC are not provided with appropriate cleaning supplies.²² Contradicting the CDC’s guidelines, the PRR does not require social distancing, saying that it “may not be possible in congregate settings such as detention facilities,” so instead recommends alternative measures including directing people to “avoid congregating in groups of 10 or more, employing social distancing strategies at all times.”²³ Based on Plaintiffs’ descriptions of crowded conditions, this is not possible at ECDC. Moreover, the PRR fails to recognize the basic fact that social distancing at all times is absolutely required to combat this virus. Hassig Decl. ¶7. Indeed, both at points of entry into ECDC and during periods of detention, the PRR is woefully insufficient to prevent spread of the virus. Hassig Decl. ¶¶ 8-12. The PRR’s guidance on screening and nonexistent guidance on testing are also entirely inadequate. Hassig Decl. ¶ 8; 14.

Further, although ICE has temporarily suspended social visitation in all detention facilities, staff, contractors, and vendors continue to arrive and leave the detention centers. Detained individuals are also frequently transported to, from, and between facilities – ICE has not stopped transferring individuals into ECDC,

²¹ CENTERS FOR DISEASE CONTROL AND PREVENTION, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities* (Mar. 23, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>.

²² Madjitov Decl. ¶9; Castro Decl. ¶5; Williams Decl. ¶5.

²³ *Id.* at 13.

even after the CDC recommended against transfers on March 23, 2020.²⁴ Additionally, ECDC also detains hundreds of pre-trial and post-sentence county inmates. Although those detained in county custody are in separate units, staff and contractors move between units, and county inmates who have cleaning, commissary, meal delivery and other job duties leave their units and in some cases enter the ICE units. This creates a dangerous path of transmission from the Etowah County community to ECDC and from unit to unit within ECDC – and then back out to the community, when staff and contractors return home. The facility has also adopted measures—including crowding the entire ICE population of over one hundred detainees into a single housing unit within the jail,²⁵ and using a “fogger” machine to spray disinfectant throughout the housing units,²⁶ – that are in direct contravention of public health experts’ recommendations on social

²⁴ CENTERS FOR DISEASE CONTROL AND PREVENTION, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, at 9 (Mar. 23, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf>; *see, e.g.*, Hernandez Decl. ¶ 6 (“This has not stopped ICE from bringing new people into our unit. ICE transferred five new people into our dorm this weekend.” (dated Mar. 30, 2020)).

²⁵ *See, e.g.*, Blanc Decl. ¶ 5 (“Unit 9 is designed and run like a jail with approximately 110 detainees. Previously, immigration detainees were in two units but we have now all been crammed into a single unit. Most cells in Unit 9 are shared by at least two detainees.”); Castellano Decl. ¶ 4; Flores Decl. ¶ 4; Golding Decl. ¶ 10; *see also* Ryan Devereaux, “*Burials are Cheaper than Deportations*”: *Virus Unleashes Terror in A Troubled Detention Center*, THE INTERCEPT (Apr. 12, 2020), <https://theintercept.com/2020/04/12/coronavirus-ice-detention-jail-alabama/>.

²⁶ Dustin Fox, *Commissioners approve emergency funding for Sheriff’s Department, District Attorney, amid COVID-19*, GADSDEN TIMES (Apr. 7, 2020), <https://www.gadsdentimes.com/news/20200407/commissioners-approve-emergency-funding-for-sheriffs-department-district-attorney-amid-covid-19>.

distancing and proper hygiene, *see* Eaton Decl. ¶ 30, potentially putting Plaintiffs at even greater risk.

Anything short of aggressive screening and testing of detained individuals, staff, and other care and service providers who enter the facility is insufficient to prevent infection. Neither ICE nor ECDC has the resources necessary to engage in such an effort. Meyer Decl. ¶¶ 15, 30; Eaton Decl. ¶ 33. Importantly, the COVID-19 pandemic – and ICE’s unsatisfactory response to it – will significantly strain ICE’s already broken medical care system, while the healthcare system in surrounding areas is expected to soon be overloaded, significantly reducing the capacity to provide emergency, life-saving medical care to all. Eaton Decl. ¶¶ 19-22. Long before the COVID-19 outbreak, numerous reports (including by DHS itself) have identified serious and substantial flaws in ICE’s medical care system.²⁷

²⁷ DHS OFF. OF THE INSPECTOR GEN., *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), <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 (Jun. 2018), 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), <https://www.propublica.org/article/ice-has-repeatedly-failed-to-contain-contagious-diseases-our-analysis-shows-its-a-danger-to-the-public>; HUMAN RTS. WATCH & CIVIC, *Systemic Indifference: Dangerous & Substandard Medical Care in US Immigration Detention* (May 8, 2017), <https://www.hrw.org/report/2017/05/08/systemic-indifference/dangerous-substandard-medical-care-us-immigration-detention> (featuring data and interviews with individuals detained at ECDC and other detention centers known for inadequate medical care).

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

Public health experts with experience in immigration detention have recommended the release of medically vulnerable individuals as the only adequate measure to protect their lives. Two DHS medical experts sent a letter to Congress warning of the severe public health risks of keeping individuals detained and recommending release of most persons in immigration detention, stating that “acting immediately will save lives not only of those detained, but also detention staff and their families, and the community-at-large.”²⁸ 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.”²⁹

Releasing the most vulnerable people, such as Plaintiffs, would also reduce the burden on regional hospitals and health centers, which will have to respond to the surge of serious illnesses from the ECDC population and the population at

²⁸ Letter from Dr. Scott Allen and Dr. Josiah Rich, to House Comm. on Homeland Sec. (Mar. 19, 2020), <https://www.documentcloud.org/documents/6816336-032020-Letter-From-Drs-Allen-Rich-to-Congress-Re.html#document/p4/a557238>; Shoichet, *Doctors Warn of “Tinderbox Scenario”*, *supra* n. 1.

²⁹ John Sandweg, *I Used to Run ICE. We Need to Release the Nonviolent Detainees*, THE ATLANTIC MONTHLY (Mar. 22, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/release-ice-detainees/608536/>; Camilo Montoya-Galvez, “Powder kegs”: Calls grow for ICE to release immigrants to avoid coronavirus outbreak, CBS NEWS (Mar. 19, 2020), <https://www.cbsnews.com/news/coronavirus-ice-release-immigrants-detention-outbreak/>.

large.³⁰ Meyer Decl. ¶¶ 16, 35-37; Eaton Decl. ¶¶ 19-22. Jurisdictions across the United States have recognized the importance of significantly thinning the prison and jail population. On March 26, Attorney General Barr issued a directive to the Board of Prisons urging reduction of the prison population through the use of home confinement.³¹ Numerous jurisdictions across the United States including Mobile County, Alabama, New Orleans, Los Angeles, New York, and Chicago have also released detained individuals for the same reasons.³² On March 22, the New Jersey Supreme Court issued a consent order for the presumptive release of approximately 1,000 persons by March 26. On April 2, Alabama Governor Kay Ivey issued a supplement to Alabama's State of Emergency allowing local officials to reduce the size of the local detained population.³³

ARGUMENT

Under Rule 65 of the Federal Rules of Civil Procedure, a movant is entitled to a temporary restraining order to preserve the status quo—here, the health and

³⁰ A forthcoming study in the Journal of Urban Health modeling COVID-19 outbreaks in ICE facilities found that outbreaks in ICE detention centers may overwhelm nearby ICU beds. See Irvine, et al., *Modeling COVID-19 and Impacts on U.S. Immigration and Enforcement (ICE) detention facilities*, *supra* n.10.

³¹ See William Barr, *Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic* (Mar. 26, 2020), <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>.

³² Harress, *Amid COVID-19 pandemic, Mobile Metro Jail releases a third of inmates*, *supra* n.6.

³³ Gov. Kay Ivey, *Fifth Supplemental SOE COVID-19* (Apr. 2, 2020), https://governor.alabama.gov/assets/2020/04/2020-04-02-Fifth-Supplemental-SOE_COVID-19.pdf

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. *Levi Strauss & Co. v. Sunrise Int’l Trading Inc.*, 51 F.3d 982, 985 (11th Cir. 1995); *accord Friedenberg v. Sch. Bd. of Palm Beach Cty.*, 911 F.3d 1084, 1090 (11th Cir. 2018). “Where, as here, the ‘balance of the equities weighs heavily in favor of granting the [injunction]’ the Plaintiffs need only show a ‘substantial case on the merits.’” *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289, 1298 (11th Cir. 2005). 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 record evidence showing that Plaintiffs, through likely exposure to the surging COVID-19 pandemic, are particularly vulnerable to severe illness and death, which 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, particularly in light of the less restrictive alternatives readily available to them. In recent weeks, dozens of courts have ordered detained persons released because such conditions impose unconstitutional punishment on persons in civil

detention or otherwise reflect deliberate indifference to plaintiffs in violation of due process.

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

“A showing of irreparable injury is ‘the sine qua non of injunctive relief.’” *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (quoting *Ne. Fla. Chapter of Ass'n of Gen. Contractors v. Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990)). The Eleventh Circuit requires only a “substantial likelihood” of irreparable injury. *Id.* at 1179. “An injury is ‘irreparable’ only if it cannot be undone through monetary remedies.” *Ne. Fla. Chapter of Ass'n of Gen. Contractors v. Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990).

Without emergency relief from this Court, Plaintiffs face a substantial threat of imminent illness and injury, including possible death – harms no court can otherwise remedy, which establishes irreparable harm. *See, e.g., M.R. v. Dreyfus*, 697 F.3d 706, 729 (9th Cir. 2012); *see Vazquez-Berrera v. Wolf*, No. 20-cv-1241, ECF No. 41 at 14 (S.D. Tex. Apr. 17, 2020) (“Given Plaintiffs’ vulnerabilities to serious illness if infected with the coronavirus and the serious and imminent risk of infection if they remain in immigration detention, Plaintiffs have shown irreparable harm.”). And, short of release, there are no sufficient measures – preventative or palliative – that Defendants can implement to protect Plaintiffs from the crowded, unsanitary conditions in ECDC. Eaton Decl. ¶¶ 29-33. COVID-19 poses

unprecedented threats to the safety of these individuals – and those who come in contact with them, including ICE staff, healthcare providers, and local populations – necessitating their release. Meyer Decl. ¶¶ 35-37; Eaton Decl. ¶¶ 34-36.

Plaintiffs can also demonstrate irreparable harm through a showing, *see infra* Section II, that Defendants have violated their constitutional rights. *See Cunningham v. Adams*, 808 F.2d 815, 822 (11th Cir. 1987); *Castillo v. Barr*, No. CV 20-00605-TJH, ECF No. 32, at 9 (C.D. Cal. Mar. 27, 2020) (exposure to risk of “harm caused by a pandemic,” violates constitutional rights and is irreparable injury).

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 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).

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 Hamm v. DeKalb County*, 774 F.2d 1567, 1573 (11th Cir. 1985); *Cook ex rel. Estate of Tessier v. Sheriff of Monroe Cty.*, 402 F.3d 1092, 1115 (11th Cir. 2005).

1. Because They Are Confined in Civil Immigration Custody, Plaintiffs Have a Right to be Free From Punitive Confinement.

A person in civil immigration detention has due process rights that are, at a minimum, similar to those of a person detained in pretrial detention prior to an adjudication of guilt. Due process mandates that those in civil detention not be punished. *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979); *Magluta v. Samples*, 375 F.3d 1269, 1273 (11th Cir. 2004). Unlike individuals in prison, where the state interest in detention is much higher and punishment is unconstitutional only if it is cruel and unusual, for persons in civil or pretrial detention, due process prevents imposition of *any* punishment whatsoever. *See Marsh v. Fla. Dep't of Corrections*, 330 F. App'x 179 (11th Cir. 2009); *Lynch v. Baxley*, 744 F.2d 1452, 1462-63 (11th Cir. 1984); *Youngberg v. Romeo*, 457 U.S. 307 at 322 (persons in civil detention are entitled to “more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.”).

Detention amounts to impermissible punishment when “it is not reasonably related to a legitimate goal,” if it is “‘excessive’ in relation to a legitimate goal,” or

if it is otherwise “arbitrary or purposeless.” *Wolfish*, 441 U.S. at 539; *Jacoby v. Baldwin County*, 835 F.3d 1338, 1345 (11th Cir. 2016). To make this showing, a plaintiff need not demonstrate the defendant has a subjective or malicious intent to punish. *Jacoby*, 835 F.3d at 1345.

Given the cramped, unsanitary, and irremediably perilous conditions in ICE detention facilities, and at ECDC in particular, Plaintiffs face a substantial risk of contracting COVID-19. And once these at-risk Plaintiffs are exposed, they are vulnerable to severe illness or death. 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, particularly where ICE possesses less restrictive means to achieve its ends. As the Southern District of Texas recently stressed in finding a substantive due process violation and ordering release of an individual detained by ICE, “ICE has a number of alternative tools available to it to ensure enforcement, which it is free to use with Plaintiffs if they are released from detention,” including “conditional supervision.” *Vazquez-Berrera v. Wolf*, No. 20-cv-1241, ECF No. 41, at 14 (S.D. Tex. Apr. 17, 2020).³⁴

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

³⁴ This alternative supervision program is highly effective, with a 99% attendance rate at all immigration court hearings and a 95% attendance rate at final hearings among supervised individuals. U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-26, *Alternatives to Detention: Improved Data Collection and Analyses Needed to Better Assess Program Effectiveness* 30 (Nov. 2014), <https://www.gao.gov/assets/670/666911.pdf>.

In addition to affirmatively imposing punitive conditions of confinement, *supra* Section II(A), a government official violates the Due Process Clause if he has acted or failed to act with deliberate indifference to the detained person's needs. *See Hamm v. DeKalb County*, 774 F.2d 1567, 1574 (11th Cir. 1985). Courts find deliberate indifference when a plaintiff can show: (1) "an objectively serious medical need;" and (2) "that the prison official acted with deliberate indifference to that need." *Brown v. Johnson*, 387 F.3d 1344, 1351 (11th Cir. 2004).

The Eleventh 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." *Gary v. Modena*, 244 F. App'x 997, 999 (11th Cir. 2007) (quoting *Farmer v. Brennan*, 511 U.S. 825, 847 (1994)). But showing a likelihood of *actual* serious injury or death is not required. As the Supreme Court has ruled, confining individuals in crowded conditions where they are at risk of infectious disease is unconstitutional even when it "is not alleged that the likely harm would occur immediately and even though the possible infection might not affect all of those exposed," and prison officials cannot be "deliberately indifferent to the exposure of inmates to a serious, communicable disease on the ground that the complaining inmate shows no serious current symptoms." *Helling v. McKinney*, 509 U.S. 25, 33 (1993); *see Tittle v. Jefferson Cty. Comm'n*, 10 F.3d 1535, 1543 (11th Cir. 1994) ("Nor does it matter that some inmates may not be

affected by the condition, and that the harm is thus, in a sense, only potential harm . . . ‘and even though the possible infection might not affect all of those exposed.’”) (quoting *Helling*, 509 U.S. at 33); 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). The Middle District of Louisiana just held that a prisoner-plaintiff (not a civil detainee) was likely to succeed in Eighth Amendment deliberate indifference claim simply because of inability of prison to fully comply with CDC guidelines. See *Marlowe v. Leblanc*, No. 18-cv-063, ECF No. 115, at 10 (M.D. La. Apr. 23, 2020). Numerous courts across the country have recognized the heightened risk to individuals in detention and have ordered their release, compelling a similar result here for these vulnerable Plaintiffs facing an escalating spread of COVID-19 in Alabama and its jails and detention centers.³⁵

³⁵ See, e.g., *Fraihat v. ICE*, EDCV 19-1546 JGB (SHKx), 2020 WL 1932570 (C.D. Cal. Apr 20, 2020); *Malam v. Adducci*, No. 20-10829 (E.D. Mich. Apr. 20, 2020) (order granting preliminary injunction mandating release); *Fraihat v. Wolf*, No. ED CV 20-00590 TJH (KSx) (C.D. Cal. Mar 30, 2020); *Coronel, et al. v. Decker*, No. 1:20-cv-02472-AJN, 2020 U.S. Dist. LEXIS 53954 (S.D.N.Y. Mar. 27, 2020); *Calderon Jimenez v. Wolf*, No. 18-10225 (MLW), ECF No. 507 (D. Mass. Mar. 26, 2020); *Umana Jovel v. Thomas Decker, et al.*, No. 1:20-cv-00308-GBD-SN, 2020 U.S. Dist. LEXIS 52095 (S.D.N.Y. Mar. 24, 2020); *Basank, et al. v. Decker, et al.*, No. 1:20-cv-02518-AT, 2020 U.S. Dist. LEXIS 53191 (S.D.N.Y. Mar. 26, 2020); *Xochihua-Jaimes v. Barr*, No. 18-cv-71560, 2020 U.S. App. LEXIS 9190 (9th Cir. Mar. 23, 2020); *Hope v. Doll*, No. 1:20-cv-5622020, U.S. Dist. LEXIS 63970 (M.D. Pa. Apr. 7, 2020); *In the Matter of the Request to Commute or Suspend County Jail Sentences*, Case No. 84230 (N.J. Mar. 22, 2020); *Matter of Extradition of Toledo Manrique*, No. 19-mj-71055-MAG-1 (TSH), 2020 U.S. Dist. LEXIS 50017, at *1 (N.D. Cal. Mar. 19, 2020); *United States v. Martin*, No. 19 Cr. 140-13, 2020 U.S. Dist. LEXIS 46046, at *2 (D. Md. Mar. 17, 2020); *Hernandez-Roman v. Wolf*, 5:20-

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, e.g., Valderrama v. Rousseau*, 780 F.3d 1108, 1116 (11th Cir. 2015) (knowledge of the risk of serious harm may be inferred by the obviousness of the risk) (citing *Farmer*, 511 U.S. at 842). 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.³⁶ Medical experts within DHS itself have described the risk of this virus to those in immigration detention.³⁷ ICE has received numerous letters from experts, Members of Congress, and non-governmental organizations alerting it to the risk of COVID-19.³⁸ Persons in immigration detention, including in ECDC, have protested against the conditions that render them vulnerable during this pandemic.³⁹ The World

cv-00768-TJH-PVC, 2020 U.S. Dist. LEXIS 72080, at X* (C.D. Cal. Apr. 23, 2020). Those cases that are not available on electronic databases are attached to this brief as Exhibit 22.

³⁶ IMMIG. AND CUSTOMS ENFORCEMENT, *ICE Guidance on COVID-19, Confirmed Cases*, <https://www.ice.gov/coronavirus> (last accessed Apr. 25, 2020).

³⁷ Shoichet, *Doctors Warn of “Tinderbox Scenario”*, *supra* n.1.

³⁸ Letter from 763 non-governmental organizations to Matthew T. Albence, Acting Director of ICE (Mar. 19, 2020), <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), <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2020-03-11.CBM%20and%20JR%20to%20Wolf-DHS%20re%20COVID-19.pdf>.

³⁹ Kimberly Kindy et al., “Disaster waiting to happen”: Thousands of inmates released as jails and prisons face coronavirus threat, WASHINGTON POST (Mar. 25, 2020), <https://www.washingtonpost.com/national/disaster-waiting-to-happen-thousands-of-inmates->

Health Organization and the CDC have emphasized the risk of this disease, its infectiousness, and its severity in those with underlying medical conditions.⁴⁰

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.⁴¹

In Alabama specifically, there is ample information available about the rapid spread of the virus. At 12:00 PM CST on April 21, 2020, 5,114 people had tested positive for COVID-19.⁴² By 6:45 PM CST the same day, more than 160 new cases were reported across the state.⁴³ As of April 28 2020, there are 6,580 confirmed positive cases of COVID-19. Despite the rapid spread, less than one

released-as-jails-face-coronavirus-threat/2020/03/24/761c2d84-6b8c-11ea-b313-df458622c2cc_story.html; Ryan Devereaux, “*Burials Are Cheaper Than Deportations*”: *Virus Unleashes Terror in a Troubled ICE Detention Center*, THE INTERCEPT (Apr. 12, 2020), *t* <https://theintercept.com/2020/04/12/coronavirus-ice-detention-jail-alabama/>.

⁴⁰ CENTERS FOR DISEASE CONTROL AND PREVENTION, *Information for Healthcare Professionals: COVID-19 and Underlying Conditions*, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/underlying-conditions.html> (last accessed Apr. 27, 2020); WORLD HEALTH ORG., *Coronavirus Disease 2019 (COVID-19) Situation Report – 97* at 10 (Apr. 26, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200426-sitrep-97-covid-19.pdf?sfvrsn=d1c3e800_6.

⁴¹ See, e.g., Abigail Hauslohner, Nick Miroff & Matt Zapotosky, *Coronavirus Could Pose Serious Concern in ICE Jails, Immigration Courts*, WASHINGTON POST (Mar. 12, 2020), https://www.washingtonpost.com/immigration/coronavirus-immigration-jails/2020/03/12/44b5e56a-646a-11ea845d-e35b0234b136_story.html; Josiah Rich, Scott Allen & Mavis Noah, *We Must Release Prisoners to Lessen the Spread of Coronavirus*, WASHINGTON POST (Mar. 17 2020), <https://www.washingtonpost.com/opinions/2020/03/17/we-must-release-prisoners-lessen-spreadcoronavirus/>.

⁴² *Alabama Now at 5,296 cases of COVID-19, 182 Deaths*, WRBL (Apr. 21, 2020), available at <https://www.wrbl.com/news/alabama-news/evening-update-alabama-now-at-5296-cases-of-covid-19-182-deaths/>.

⁴³ *Id.*

percent of the state has been tested.⁴⁴ Those incarcerated are at particular risk of harm: Alabama’s first reported COVID-19-related death was an incarcerated individual.⁴⁵

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); *J.R. v. Hansen*, 803 F.3d 1315, 1321 (11th Cir. 2015). And the reason for detention must be forward-looking, in order to support a continuing, legitimate purpose, *Foucha v. Louisiana*, 504 U.S. 71 (1992), *Zadvydas v. Davis*, 533 U.S. 678 (2001); it cannot be punitive. Yet, Acting ICE Director Albence, who has jurisdiction over ECDC, effectively admitted that continued detention in these circumstances for these medically individuals is not related to any neutral and legitimate government reason. Rather,

⁴⁴ Chip Brownlee, *Is Alabama Ready to Ease COVID-19? A Look at the Data*, ALABAMA POLITICAL REPORTER (Apr. 20, 2020), <https://www.alreporter.com/2020/04/20/are-we-finding-all-of-alabamas-covid-19-cases-definitely-not/>.

⁴⁵ *First COVID-19 Related Death Reported in Alabama Prison*, ST. CLAIR NEWS-AEGIS (Apr. 22, 2020), https://www.newsaeigis.com/news/first-covid-19-related-death-reported-in-alabama-prison/article_61dfaf84-84ba-11ea-9cc6-830719a9dcc4.html.

it is to convince the public that ICE is “enforcing our immigration laws” – *i.e.* to publicly project a punitive purpose. Yet, “[r]etribution and deterrence are not legitimate nonpunitive governmental objectives,” particularly where governmental objectives “could be accomplished in so many alternative and less harsh methods.” *Bell*, 441 U.S. at 539 n. 20.

Once a valid basis for detention no longer exists, substantive due process requires the state to release the person. *Foucha*, 504 U.S. at 86 (ordering petitioner’s release from commitment to mental institution because there was no longer any evidence of mental illness); *accord Kansas v. Hendricks*, 521 U.S. 346, 363-64 (1997). Continuing to detain Plaintiffs in conditions that impose a substantial risk of illness or death eviscerates any legitimate purpose for their detention and fully authorizes release or, at a minimum, more narrowly tailored means to achieve any purportedly legitimate purpose of detention. *See Vazquez-Berrera*, 20-cv-1241, at 12 (“ICE has many other means besides physical detention to monitor noncitizens and ensure that they are present at removal proceedings and at time of removal,” including routine check-ins).

III. THE BALANCE OF THE EQUITIES AND 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). An injunction would protect public

health and safety, paramount considerations that weigh heavily in favor of an injunction. *See, e.g., Grand River Enters. Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 169 (2d Cir. 2005) (referring to “public health” as a “significant public interest[]”); *see also* Dr. Allen and Dr. Rich Letter, *supra* n. 23 (“[I]t is essential to consider releasing all detainees who do not pose an immediate risk to public safety”).

Because Plaintiffs present minimal risk to community safety, the comparative burden to the government in releasing Plaintiffs is nominal.⁴⁶ Release not only saves the government time and money, it actually *reduces* detention center density, decreasing the chances of COVID-19 transmission to detained persons, staff and their families, and the broader Etowah County community, and avoids correspondingly escalating medical costs. Eaton Decl. ¶¶ 19-22; 34-36. As the *Vazquez Berrera* court explained, “an outbreak among the . . . detainee population will inevitably spread through the surrounding community, as . . . staff members, who live outside the detention facility, will be exposed to sick detainees . . . [and] will put additional strain on hospitals and health care resources in the community.” No. 20-cv-1241, at 15.

IV. IMMEDIATE RELEASE IS THE ONLY EFFECTIVE REMEDY FOR PLAINTIFFS’ UNLAWFUL DETENTION, WHICH THE COURT

⁴⁶ Although most Plaintiffs have one or more criminal convictions, many of those convictions are from over a decade ago, some carried no jail time, and every Plaintiff has served their sentence and is no longer confined in criminal custody (if they ever were in the first place). Thus, any supposed risk Plaintiffs may pose to the community based on their past convictions is highly speculative, unrelated to their current civil detention, and significantly outweighed by the grave risk facing Plaintiffs and the public at large if they remain in detention.

HAS AMPLE AUTHORITY TO ORDER UNDER EITHER SECTION 2241 OR RULE 65.

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 in recent days. Habeas invests in federal courts broad, equitable authority to “dispose of the matter as law and justice require,” 28 U.S.C. § 2243, as the “very nature of the writ demands that it be administered with the initiative and flexibility.” *Harris v. Nelson*, 394 U.S. 286, 292 (1969).

While it is clear in 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 relief pursuant to 42 U.S.C. § 1983 – authorizes challenges to conditions of confinement. *See Preiser v. Rodriguez*, 411 U.S. 475, 499-500 (1973) (explicitly leaving this question open in the context of a habeas petition by a state prisoner).

In this case, however, this is only an academic distinction. This petition does not challenge conditions of confinement in the way this purported distinction imagines. *Vazquez-Berrera*, No. 20-cv-1241, at 8 (“The mere fact that Plaintiffs’ constitutional challenge requires discussion of conditions in immigration detention does not necessarily bar such a challenge in a habeas petition.”). Plaintiffs are not seeking judicial intervention in order to alleviate harsh conditions; it is precisely

because there is no judicial or administrative possibility of remediating their unconstitutional confinement that they are challenging the very *fact* of their confinement. *See Malam v. Adducci, et al.*, No. 2:20-cv-10829-JEL-APP, ECF No. 22 at 8 (E.D. Mich. Apr. 5, 2020) (habeas appropriate for COVID-19 release because petitioner “seeks immediate release from confinement as a result of there being no conditions of confinement sufficient to prevent irreparable constitutional injury under the facts of her case.”).⁴⁷ As such, they seek “the traditional function of the writ”: “release from illegal custody.” *Preiser*, 411 U.S. at 484.

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), including an order of release, *Boumediene*, 553 U.S. 723, 779 (2008), so as “to insure that miscarriages of justice . . . are surfaced and corrected.” *Harris*, 395 U.S. at 291.

Independent of the court’s authority under Section 2241, the court maintains under Rule 65 and its inherent equitable authority the power to remedy unconstitutional government conduct, including issuing orders “placing limits on a prison’s population.” *Brown v. Plata*, 563 U.S. 493, 511 (2011); *see also Mobile Cty. Jail Inmates v. Purvis*, 581 F. Supp. 222, 224-26 (S.D. Ala. 1984) (exercising

⁴⁷ *Accord Coreas v. Bounds*, No. 20-0780, 2020 WL 1663133, at *7 (D. Md. Apr. 3, 2020); *Mays v. Dart*, No. 20 C 2134, 2020 WL 1812381, at *6 (N.D. Ill. Apr. 9, 2020); *A.S.M. v. Donahue*, No. 20-CV-62, 2020 WL 1847158, at *1 (M.D. Ga. Apr. 10, 2020); *Wilson v. Williams*, No. 20 cv 794, ECF No. 22 at 10-11 (N.D. Ohio, Apr. 22, 2020).

remedial powers to order a prison's population reduced to alleviate unconstitutional conditions). Accordingly, in the midst of this unprecedented public health crisis, numerous courts considering the plight of detained individuals have ordered release. *See supra* n. 35 and 47 (collecting sampling of cases).

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

Courts have discretion to waive the Rule 65(c) requirement that the movant for a temporary restraining order provide security. *BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs., LLC*, 425 F.3d 964, 971 (11th Cir. 2005). District courts in this circuit routinely exercise this discretion to require no security in cases brought by indigent or incarcerated people. *See, e.g., Schultz v. Alabama*, 330 F. Supp. 3d 1344, 1376 (N.D. Ala. 2018) (county prisoners); *Campos v. I.N.S.*, 70 F. Supp. 2d 1296, 1310 (S.D. Fla. 1998) (indigent 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 28, 2020

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Counsel for Petitioners-Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that the above **Plaintiffs' Memorandum of Law in Support of Their Motion for a Temporary Restraining Order** was on this day electronically filed with the Clerk of Court using the Court's CM/ECF system. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

Dated: April 28, 2020

s/ Jessica Vosburgh _____
Jessica Myers Vosburgh