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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 Sofia Bahena Ortuño; Gennady Valeryevich
14 Lavrus; Claude Bent; Charles Joseph;
15 Salomon Medina Calderon; Ricardo Vasquez
16 Cruz; J. Elias Solorio Lopez; Olvin Said
17 Lopez; Olvin Said Torres Murillo; Julio
18 Cesar Buendia Alas; Marco Montoya
19 Amaya; Mauricio Ernesto Quinteros Lopez;
20 Roxana del Carmen Trigueros Acevedo;
21 Ernesto Ambrocio Uc Encarnacion,

22 Petitioners-Plaintiffs,

23 v.

24 DAVID JENNINGS, Acting Director of the
25 San Francisco Field Office of U.S. Immigration
26 and Customs Enforcement; MATTHEW T.
27 ALBENCE, Deputy Director and Senior
28 Official Performing the Duties of the Director
of the U.S. Immigration and Customs
Enforcement; U.S. IMMIGRATION AND
CUSTOMS ENFORCEMENT,

Respondents-Defendants.

Case No.

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

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*Admission to the bar of this Court Pending

**Motion for Admission *Pro Hac Vice*

Forthcoming

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INTRODUCTION

1
2 1. This action is being filed in the midst of a rapidly evolving global pandemic of frightening
3 proportions, by immigrants whose continued civil detention by the San Francisco Field Office Defendant
4 U.S. Customs and Immigration Enforcement (“ICE”) places them at extraordinary risk of infection, illness,
5 and death.

6 2. The clock is ticking. On March 22, 2020, the number of worldwide diagnoses of the
7 coronavirus reached 300,000. This is double the number from a week before. The United States has the third
8 largest number of diagnoses in the world. As of Monday, March 22, there were more than 30,000 diagnosed
9 cases within the United States, and more than 375 deaths. By the time this Court reads this complaint, there
10 will be more diagnoses, and more deaths, with no end in sight.

11 3. It is effectively impossible for Plaintiffs to protect themselves against COVID-19 infection in
12 the two immigration detention centers where ICE is holding them: Mesa Verde ICE Processing Facility
13 (“Mesa Verde”) and Yuba County Jail (“Yuba”). Each of the Plaintiffs is of advanced age and/or suffers
14 underlying health conditions which make them particularly vulnerable to severe and rapidly progressing
15 effects of COVID-19, including death. Yet these Plaintiffs remain detained with the general population in
16 both facilities, sleeping in bunks within arms-reach of other detainees and with no choice but to use shared
17 communal dining, bathing, and recreation areas. Facility staff have rebuffed their inquiries about COVID-19
18 risks and precautions, and Defendants have rejected their attorneys’ requests for humanitarian release.

19 4. During this global pandemic, the Center for Disease Control and Prevention (“CDC”) and
20 other public health experts advise that the only effective means of limiting transmission of the virus are
21 practicing “social distancing,” with a recommended minimum of six feet between people and reduced
22 frequency of contact, and maintaining rigorous personal hygiene. People in congregate environments—
23 places where people live, eat, and sleep in close proximity—face increased risk of contracting COVID-19, as
24 already evidenced by the rapid spread of the virus in cruise ships and nursing homes. For people such as
25 Plaintiffs, who are confined in Mesa Verde and Yuba, it is effectively impossible to engage in the social
26 distancing and hygiene practices necessary to mitigate the risk of transmission.

27 5. The grave threats of the spread of COVID-19, and of a spiraling cascade of illness and deaths,
28 have convinced public health and government officials worldwide to undertake extraordinary measures. For

1 example, within the past week, “shelter in place” orders have been issued throughout the Bay Area, in the
2 State of California, and in a growing number of jurisdictions nationwide, requiring people to severely limit or
3 eliminate non-essential activities and to maintain social distancing of at least six feet from other people to the
4 maximum extent possible. One in four people in the country are now governed by a shelter in place directive.
5 The land borders with Mexico and Canada have largely been sealed to travel deemed “non-essential.”

6 6. Recognizing the urgency of present circumstances, judges, prosecutors and correctional
7 authorities across the country have been ordering releases to protect individuals and the public health. Such
8 releases not only protect the people with the greatest vulnerability to serious illness and death COVID-
9 19 from transmission of the virus, they also contribute to greater risk mitigation for all people in custody or
10 working in a prison, jail, or detention center, and reduces the burden on the surrounding region’s
11 limited health care infrastructure, as it lessens the likelihood that an overwhelming number of people will
12 become seriously ill from COVID-19 at the same time. Many of California’s largest jails have released
13 people detained in the criminal justice system to protect those people and the community from COVID-19.
14 Alameda County’s Santa Rita Jail released 300 people. Los Angeles County released over 1,000 people from
15 its jails. The Kern County Jail, located fifteen minutes from Mesa Verde, has released dozens of detainees.
16 Law enforcement and jail officials in New Jersey, New York City, Cleveland, Nashville, Houston, San
17 Antonio, Charlotte, and numerous other jurisdictions are releasing both civil detainees and, in many cases,
18 people serving sentences for criminal convictions, because of the threat COVID-19 poses inside jails. For
19 example, on March 22 the New Jersey Supreme Court issued a consent order presumptively ordering the
20 release of every person serving a county jail sentence by no later than Thursday morning, March 26.¹ And
21 Magistrate Judge Thomas S. Hixson of this Court recently altered the conditions of bail for an individual to
22 postpone incarceration, after taking into account his risk of vulnerability to the coronavirus. *In the Matter of*
23 *the Extradition of Alejandro Toledo Manrique*, Case No. 19-mj-71055, 2020 WL 1307109, at *1 (N. D. Cal.
24 March 19, 2020).

25 7. ICE’s response to the threats the pandemic poses to immigrants, by contrast, has been
26 abysmal and haphazard. As Californians began to shelter in their homes in compliance with public health
27

28 ¹ Consent Order, *In the Matter of the Request to Commute or Suspend County Jail Sentences*, No. 084230 (N.J. March 22, 2020) available at https://www.aclu-nj.org/files/5415/8496/4744/2020.03.22_-_Consent_Order_Filed_Stamped_Copy-1.pdf.

1 directives to practice social distancing on Monday, March 16, ICE’s Los Angeles Field Office executed pre-
2 dawn raids to cram even more immigrants into detention centers. The Field Office Director stated to the L.A.
3 Times: “We couldn’t factor this in, right? This COVID-19 and the precautions that everybody’s taking . . .
4 We just have to continue to go with the same game plan that we’ve been doing.”² Following public outcry,
5 the next day ICE issued a statement that it would modify its enforcement efforts in apparent recognition of
6 the need for alternatives to detention to protect public health.³ The day after, however, in response to a
7 lawsuit for the release of vulnerable ICE detainees, the agency again demonstrated its failure to appreciate
8 the threats the COVID-19 pandemic presents, asserting that “Plaintiffs’ assertion that detention *per se* poses
9 an increased risk of health complications or death from COVID-19 is purely speculative.”⁴ ICE’s head-in-
10 the-sand response to the threats of this pandemic will prove deadly to immigrant detainees if it is not
11 remedied through this Court’s intervention.

12 8. The following day, Thursday, March 19, 2020, two medical subject matter experts for the
13 Department of Homeland Security’s Office of Civil Rights and Civil Liberties blew the whistle to Congress,
14 writing “regarding the need to implement immediate social distancing to reduce the likelihood of exposure to
15 detainees, facility personnel, and the general public, ***it is essential to consider releasing all detainees who do***
16 ***not pose an immediate risk to public safety.***”⁵ On multiple occasions since at least February 25, 2020, these
17 experts had sounded the alarm within the agency on the imminent risks to the health of immigrant detainees
18 and the public at large presented by COVID-19 unless swift mitigation measures, including decreasing the
19 number of immigrant detainees, are taken.

20 9. Inside the facilities, moreover, immigrants say that ICE is not consistently taking even the less
21 aggressive precautionary measures the agency claims it is taking. To take one critical example, ICE is
22 introducing daily new detainees in with the general population without any mandatory quarantine period.
23 This echoes a concern of the two DHS experts, who say that “the track record of ICE facilities implementing
24 [early screening, testing, isolation and quarantine] protocols historically has been inconsistent.” Moreover,

25 _____
26 ² <https://www.latimes.com/california/story/2020-03-17/for-ice-agents-its-business-as-unusual-day-after-sweeping-coronavirus-order>

27 ³ <https://www.ice.gov/covid19>.

28 ⁴ Respondents—Defendants’ Opposition at 8, Dawson v. Asher, ECF No. 28, Case No. 20-0409 (W.D. Wash. Mar. 18, 2020).

⁵ Letter from Scott A. Allen, MD and Josiah Rich, MD, MPH to Congressional Committee Chairpersons, dated Mar. 19, 2020, available at <https://assets.documentcloud.org/documents/6816336/032020-Letter-From-Drs-Allen-Rich-to-Congress-Re.pdf> (emphasis in original).

1 even if ICE was consistently taking these precautions, the DHS experts have explained that they “won’t be
2 enough” without rapidly “releas[ing] those who do not pose an immediate danger to public safety.”⁶
3 Defendants stubbornly refuse to heed the advice of public health experts, including their own.

4 10. Plaintiffs, like all civil immigration detainees, are not being detained pursuant to a conviction
5 of any offense. Although some of the Plaintiffs have prior criminal histories, they have completed their
6 sentences. Rather, they are currently in *civil* detention because they are awaiting the completion of their
7 immigration proceedings.

8 11. ICE has significant discretion to release immigration detainees, *see* 8 U.S.C. § 1226(a), and
9 has a long-standing practice of releasing for humanitarian reasons even those whose detention has been
10 mandated under particular immigration detention statutes, *see* 8 U.S.C. §§ 1182(d)(5); 1225(b); 1226(c).
11 According to John Sandweg, a former acting head of ICE, “[t]he overwhelming majority of people in ICE
12 detention don’t pose a threat to public safety and are not an unmanageable flight risk.”⁷ ICE also regularly
13 uses alternatives to detention, such as electronic ankle monitors and telephonic monitoring, under appropriate
14 circumstances.

15 12. Even where a statute mandates a person’s detention, it is settled law that ICE cannot detain a
16 person if that application of the statute violates the Constitution. Defendants cannot justify continuing to
17 subject Plaintiffs to extraordinary risk of illness and death with any legitimate government objective,
18 particularly in light of the alternatives available to them. The danger posed by Plaintiffs’ detention during the
19 current outbreak of COVID-19 is “so grave that it violates contemporary standards of decency to
20 expose anyone unwillingly to such a risk” and violates their constitutional right to safety in
21 government custody. *Helling v. McKinney*, 509 U.S. 25, 36 (1993). Plaintiffs bring this action to remedy
22 grave violations of their constitutional rights that imminently threaten them with serious illness and death.

23 13. Unless this Court intervenes to order the release of the Plaintiffs, they, along with many other
24 detained individuals, will face dramatically increased chances of contracting COVID-19, becoming seriously
25 ill, and dying.

26
27 ⁶ *See*, “We must release prisoners to lessen the spread of coronavirus,” Washington Post
<https://www.washingtonpost.com/opinions/2020/03/17/we-must-release-prisoners-lessen-spread-coronavirus/>.

28 ⁷ 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/amp/news/coronavirus-ice-release-immigrants-detention-outbreak/?__twitter_impression=true.

PARTIES

Plaintiffs

14. Plaintiff Sofia Bahena Ortuño is a 64-year-old woman who suffers from hypothyroidism and diabetes. Ms. Bahena Ortuño is currently in civil detention at Mesa Verde pending her application for withholding of removal, which is based on her fear of return following her son's murder. She has six U.S. citizen grandchildren whom she helps support. She cries every day because of her concerns about COVID-19 and her health; she does not want to die in detention without seeing her family.

15. Plaintiff Gennady Valeryevich Lavrus is a 43-year-old Russian national and son of a U. S. citizen. He has now been in civil detention at Yuba for over one year. Mr. Lavrus suffers from diabetes and hypertension. His diabetes causes him dizziness and has led to neuropathy in his feet. His U.S. citizen mother awaits his release to care for him.

16. Plaintiff Claude Bent is a 58-year-old Lawful Permanent Resident ("LPR") originally from Jamaica. He is the father of 3 United States citizen children and has extensive immediate U. S. citizen and LPR family. He is currently in civil detention at Mesa Verde and awaiting his next immigration court hearing after remand from the Ninth Circuit. He suffers from severe asthma and is forced to clean his own and communal spaces in cramped conditions. His mother and brother in Washington D.C. await his release to care for him.

17. Plaintiff Charles Joseph is a 34-year-old Fijian national who has resided lawfully in the United States for nearly twenty years. He is currently in civil detention pending his immigration proceedings at Mesa Verde. Mr. Joseph suffers from asthma and was exposed to tuberculosis while in detention. His U.S. citizen wife, mother, and children await him at home.

18. Plaintiff Salomon Medina Calderon is a 56-year-old Mexican national, father of 6, grandfather of 6, and husband of 38 years, residing in the United States for the last 35 years. He is currently in civil detention at Yuba, pending his immigration proceedings. Mr. Medina Calderon suffers from diabetes and diabetes-related organ complications, near-complete blindness, and severe anemia. His wife and family await his release to care for him at their home in Greenfield, CA.

19. Plaintiff Ricardo Vasquez Cruz is a 45-year-old Salvadoran national who fled his country of birth after criminal gangs murdered his brother. He received Temporary Protected Status which he held until

1 2018. Mr. Vasquez Cruz is currently in civil detention at Yuba County Jail while his immigration case is
2 pending review at the Ninth Circuit Court of Appeals. He suffers from diabetes, which often causes him to
3 feel weak and exhausted. His U.S. citizen son, who was abandoned by his mother, is ready to welcome him
4 home.

5 20. Plaintiff J. Elias Solorio Lopez is an 82-year old Mexican national and U.S. lawful permanent
6 resident. Mr. Solorio Lopez is currently in civil detention at Mesa Verde pending his removal proceedings.
7 He has been diagnosed with significant medical and neurological illnesses which require immediate care in a
8 specialized facility. Mr. Solorio Lopez is hoping to be released to his U.S. citizen daughter and live with
9 supportive community members.

10 21. Plaintiff Olvin Said Torres Murillo is a 43-year-old Honduran national, and a husband and
11 father of two young daughters. He is an asylum-seeker and is currently in civil detention at Yuba pending the
12 resolution of his immigration proceedings. Mr. Torres Murillo suffers from high blood pressure and
13 depression.

14 22. Plaintiff Julio Cesar Buendia Alas is a 41-year-old Mexican national, son of a U.S. citizen,
15 and resident of Southern California for the last 17 years. He is currently in civil detention at Mesa Verde. He
16 suffers from hypertension, high cholesterol, and an undiagnosed severely painful testicular mass. His father
17 and siblings await his release to care for him at their home in Pomona, California.

18 23. Plaintiff Marco Montoya Amaya is a 42-year-old Honduran national seeking relief under the
19 Convention Against Torture. He is currently in civil detention at Mesa Verde pending the resolution of his
20 immigration proceedings. Mr. Montoya Amaya has been diagnosed with tuberculosis for which he has
21 received no treatment and is housed in close quarters with 100 or more other detainees. He suffers from
22 severe mental issues, including PTSD, major depression, and mild neurocognitive disorder.

23 24. Plaintiff Mauricio Ernesto Quinteros Lopez is a 28-year-old Salvadoran national from
24 Alameda County. He is in civil detention at Mesa Verde Detention Facility. Mr. Quinteros Lopez suffers
25 from hypertension, and presents symptoms consistent with COVID-19. His extensive family in Alameda
26 County are ready to receive him at home and care for him.

27 25. Plaintiff Roxana del Carmen Trigueros Acevedo is a 49-year-old Salvadoran national married
28 to Plaintiff Carolina del Carmen Espinoza Ayala. She is currently in civil detention with her partner Carolina

1 at Mesa Verde. She and Carolina fled persecution based on their sexual orientation, presented themselves at a
2 U.S. Port of Entry, and are now seeking asylum in immigration court. She suffers from hypertension and
3 colitis, which have both worsened due to her detention and the stress from the high-risk of coronavirus
4 infection in her cramped dormitory conditions. Upon release, her family, who have resided in Houston, TX
5 for 25 years, will welcome and take care of her and her partner Carolina.

6 26. Plaintiff Ernesto Ambrocio Uc Encarnacion is a 31-year-old Mexican national. He is in civil
7 detention at Yuba County Jail pending the resolution of his immigration proceedings. He has suffered from
8 asthma since childhood and currently presents symptoms consistent with COVID-19. He is surrounded by
9 others with similar symptoms in extremely cramped conditions. Mr. Uc Encarnacion has requested and been
10 refused a face mask to stem contagion. His mother has lived in San Francisco for 19 years and awaits his
11 release to care for him.

12 27. Plaintiffs seek issuance of a writ of habeas corpus ordering their release from Mesa Verde and
13 Yuba, and declaratory and injunctive relief to prevent Defendants from continuing to detain them under
14 conditions that pose an imminent threat of irreparable harm, in that their continued detention exposes them to
15 greatly increased risks of contracting COVID-19, resulting in severe illness or death.

16 **Defendants**

17 28. Respondent-Defendant David Jennings is the Acting Field Officer Director for the San
18 Francisco Field Office of ICE and maintains his office in San Francisco, California, within this judicial
19 district. The San Francisco Field Office is responsible for carrying out ICE's immigration detention
20 operations at Mesa Verde and Yuba. Defendant Jennings is a legal custodian of Plaintiffs. He is sued in his
21 official capacity.

22 29. Respondent-Defendant Matthew T. Albence is the Deputy Director and Senior Official
23 Performing the Duties of the Director of ICE. Defendant Albence is responsible for ICE's policies, practices,
24 and procedures, including those relating to the detention of immigrants. Defendant Albence is a legal
25 custodian of Plaintiffs. He is sued in his official capacity.

26 30. Respondent-Defendant ICE is a federal law enforcement agency within the Department of
27 Homeland Security. ICE is responsible for the criminal and civil enforcement of immigration laws, including
28

1 the detention and removal of immigrants. Enforcement and Removal Operations (“ERO”), a division of ICE,
2 manages and oversees the immigration detention system. Defendant ICE is a legal custodian of Plaintiffs.

3 **JURISDICTION AND VENUE**

4 31. This Court has subject matter jurisdiction over this matter under 28 U.S.C. § 1331 (federal
5 question), 28 U.S.C. § 1346 (original jurisdiction), 28 U.S.C. §§ 2201-02 (declaratory relief); 28 U.S.C. §
6 2241 (habeas jurisdiction), and Article I, Section 9, clause 2 of the United States Constitution (the
7 Suspension Clause).

8 32. The United States has waived sovereign immunity for this action for declaratory and
9 injunctive relief against one of its agencies and that agency’s officers are sued in their official capacities. *See*
10 5 U.S.C. § 702.

11 33. Venue lies in this judicial district, under 28 U.S.C. § 1391, as venue is proper in any district in
12 which a defendant resides. Venue also is proper in the Northern District of California because Defendants are
13 officers or employees of the United States and a Defendant resides in this District, *see* 28 U.S.C.
14 §1391(e)(1)(A).

15 **INTRADISTRICT ASSIGNMENT**

16 34. Pursuant to Civil L. R. 3-2(c), this case is properly assigned to the San Francisco Division of
17 this Court because the action arises in the City and County of San Francisco.

18 **ADDITIONAL FACTUAL BACKGROUND**

19 **COVID-19 Poses Grave Risk of Harm, Including Serious Illness or Death**

20 35. COVID-19 is a virus that has reached pandemic status. Because COVID-19 is easily
21 transmitted, and because testing is increasingly available, the numbers of confirmed cases and deaths are
22 expected to grow exponentially in the near term.

23 36. All human beings share an equal risk of contracting and, upon contraction, transmitting the
24 virus that causes COVID-19. Any adult who contracts the virus may experience life-threatening symptoms.
25 However, people over the age of fifty and those with certain medical conditions face greater chances of
26 serious illness or death from COVID-19. Certain underlying medical conditions increase the risk of serious
27 COVID-19 disease for people of any age, including lung disease, heart disease, hypertension, chronic liver or
28 kidney disease (including hepatitis and dialysis patients), diabetes, epilepsy, hypertension, compromised

immune systems (such as from cancer, HIV, or an autoimmune disease), blood disorders (including sickle cell disease), inherited metabolic disorders, stroke, developmental delay, and pregnancy. New information regarding COVID-19 risk factors is coming out daily. Other categories of individuals may have conditions that predispose them to complications from COVID-19, but are not yet identified by the medical literature.

37. The COVID-19 virus can severely damage lung tissue, which requires an extensive period of rehabilitation, and in some cases, can cause a permanent loss of respiratory capacity. COVID-19 may also target the heart muscle, causing a medical condition called myocarditis, or inflammation of the heart muscle. Myocarditis can affect the heart muscle and electrical system, reducing the heart's ability to pump. This reduction can lead to rapid or abnormal heart rhythms in the short term, and long-term heart failure that limits exercise tolerance and the ability to work. People of all ages and medical backgrounds who have experienced serious cases of COVID-19 describe painful symptoms including vomiting, severe diarrhea, relentless shivering, and suffocating shortness of breath.

38. Emerging evidence suggests that COVID-19 can also trigger an over-response of the immune system, further damaging tissues in a cytokine release syndrome that can result in widespread damage to other organs, including permanent injury to the kidneys and neurologic injury.

39. These complications can manifest at an alarming pace. Individuals can show the first symptoms of COVID-19 infection in as little as two days after exposure, and their condition can seriously deteriorate in as little as five days or sooner. People can also spread COVID-19 but be asymptomatic.

40. Most people who develop serious disease will need advanced support. This level of supportive care requires 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. This level of support can quickly exceed local health care resources.

41. The need for care, including intensive care, and the likelihood of death, is much higher from COVID-19 infection than from influenza. According to recent estimates, the fatality rate of people infected with COVID-19 is about ten times higher than a severe seasonal influenza, even in advanced countries with highly effective health care systems. For people in the highest risk populations, the fatality rate of COVID-19 infection is about 15 percent—ten times the average rate. Preliminary data from China showed that 20 percent of people in high-risk categories who have contracted COVID-19 there have died.

1 42. People who experience serious cases of COVID-19 who do not die from COVID-19 should
2 expect a prolonged recovery, including the need for extensive rehabilitation for profound reconditioning, loss
3 of digits, neurologic damage, and the loss of respiratory capacity.

4 43. There is no vaccine against COVID-19, nor is there any known medication to prevent or treat
5 infection. The only known effective measures to reduce the risk for vulnerable people from injury or death
6 from COVID-19 are to prevent them from being infected in the first place, and to limit community spread.
7 Social distancing or remaining physically separated from known or potentially infected individuals, and
8 vigilant sanitation and hygiene, including repeatedly and thoroughly washing hands with soap and water, are
9 the only known effective measures for protecting vulnerable people from COVID-19.

10 44. Nationally, projections by the CDC indicate that over 200 million people in the United States
11 could be infected with COVID-19 over the course of the epidemic without effective public health
12 intervention, with as many as 1.5 million deaths in the most severe projections.

13 45. In recent days, the number of reported cases of infection in many parts of the country have
14 shown a frightening increase, and numerous media outlets and public officials estimate that the reported
15 number of deaths could soon follow suit.

16 **People Detained at Mesa Verde and Yuba Face an Elevated Risk of COVID-19 Transmission.**

17 46. In institutional settings such as immigration detention centers, people who are over the age of
18 50, or who have medical conditions that put them at high risk of illness if infected by COVID-19, are at
19 grave risk of severe illness and death. Immigration detention facilities are “congregate environments,” or
20 places where people live and sleep in close proximity. Infectious diseases that are communicated by air or
21 touch are more likely to spread in these environments. This presents an increased danger for the spread of
22 COVID-19 if and when it is introduced into a facility. This is why enclosed group environments, like cruise
23 ships or nursing homes, have become the sites for the most severe outbreaks of COVID-19.

24 47. The conditions of immigration detention facilities pose a heightened public health risk for the
25 spread of COVID-19 that is even greater than in non-carceral institutions. Immigration detention facilities
26 have even greater risk of infectious spread because of crowding, the proportion of vulnerable people
27 detained, and often scant medical care resources. People live in close quarters and as a result, cannot achieve
28

1 the social distancing needed to effectively prevent the spread of COVID-19. They may be unable to maintain
2 the recommended distance of 6 feet from others and may share or touch objects used by others.

3 48. For Plaintiffs, it is near impossible for them and others detained in Yuba and Mesa Verde to
4 practice social distancing. Most sleep in barracks-style cells with dozens of others only a few feet away.
5 They endure inadequate hygiene and sanitation which raises the risk of infection and an outbreak. Toilets,
6 sinks, showers are shared, without disinfection between each use. Detainees report frequently not being
7 provided soap, or having to share a single bar of soap among many people, and having to wash their soiled
8 laundry in the shower. Food preparation and service is communal with little opportunity for surface
9 disinfection. Staff arrive and leave on a shift basis, new detainees are introduced into the environment daily
10 without quarantine, and there is limited ability, and little effort, to adequately screen staff, contractors, and
11 visitors for new, asymptomatic infection.

12 49. To make matters worse, immigration detention facilities lack adequate medical infrastructure
13 to address the spread of infectious disease and treatment of people most vulnerable to illness in detention.
14 During the H1N1 influenza epidemic in 2009, jails and prisons were sites of severe outbreaks. It is
15 reasonable to expect COVID-19 will also readily spread in detention centers, especially when people cannot
16 engage in proper hygiene and isolate themselves from infected residents or staff.

17 50. Detention centers are integral components of the public health systems in the communities in
18 which they are located. If many contract COVID-19 in such a facility they will require hospitalization in the
19 community, threatening to overwhelm the community's resources. This problem is particularly acute in rural
20 communities, such as Bakersfield and Marysville, California, in which Mesa Verde and Yuba are situated. In
21 the event of an outbreak of COVID-19 in either Mesa Verde or Yuba, the surrounding communities would be
22 unable to provide adequate medical treatment to infected persons.

23 **Population Reduction Through Release, Prioritizing the Release of Those Most Vulnerable to Severe**
24 **Cases of COVID-19, Will Reduce the Risk of a COVID-19 Outbreak in Mesa Verde and Yuba.**

25 51. Because risk mitigation is the only known strategy that can protect vulnerable groups from
26 COVID-19, and ICE has demonstrated over and over again that it is both unwilling and unable to implement
27 meaningful risk mitigation measures. Accordingly, public health experts with experience in immigration
28

1 detention and correctional settings have recommended that detention centers immediately reduce their
2 populations, beginning with the release of detainees most vulnerable to severe cases of COVID-19.

3 52. Dr. Marc Stern, a correctional health expert, has concluded that “[f]or detainees who are at
4 high risk of serious illness or death should they contract the COVID-19 virus, release from detention is a
5 critically important way to meaningfully mitigate that risk.” For that reason, Dr. Stern has recommended
6 broad release, beginning with the “release of eligible individuals from detention, with priority given to the
7 elderly and those with underlying medical conditions most vulnerable to serious illness or death if infected
8 with COVID-19.”

9 53. Dr. Robert Greifinger, a correctional health expert, has concluded that “even with the best-laid
10 plans to address the spread of COVID-19 in detention facilities, release is a key part of a risk mitigation
11 strategy. Accordingly, “[i]n [his] opinion, the public health recommendation is to release high-risk people
12 from detention, given the heightened risks to their health and safety, especially given the lack of a viable
13 vaccine for prevention or effective treatment at this stage.”

14 54. On the basis of information he has reviewed, Dr. Stern recommends immediate consideration
15 of downsizing of Mesa Verde and Yuba, with priority given to those in high risk of harm due to their age and
16 health status. He further recommends that these two facilities begin planning now to downsize further as
17 conditions change. In Dr. Stern’s view, downsizing has a number of valuable effects on public health and
18 public safety, and is the only measure that can effectively protect the health and safety of the people who
19 remain in detention. It allows for social distancing; it allows easier provision of preventive measures such as
20 soap for handwashing, cleaning supplies for surfaces, and more frequent laundering and showering; and
21 reduces the overall workload of detention staff so that they can focus on continuing to ensure the safety of
22 detainees.

23 55. Dr. Stern has also concluded that the release of detainees serves the broader community
24 because detention centers are integral parts of a community public health infrastructure. Reducing the spread
25 and severity of infection in such a center slows, if not reduces, the number of people who will become ill
26 enough to require hospitalization, which in turn reduces the health and economic burden to the local
27 community.
28

56. For at least the past month, the Department of Homeland Security’s own medical experts, who have personally investigated numerous detention facilities, have sounded the alarm on the imminent risks to the health of immigrant detainees and the public at large presented by COVID-19 unless swift mitigation measures, including decreasing the number of immigrant detainees, are taken. Alarmed by ICE’s failure to take appropriate action, these experts, each of whom has served in senior capacities within the DHS, became whistleblowers, writing to Congress, “regarding the need to implement social distancing to reduce the likelihood of exposure to detainees, facility personnel, and the general public, *it is essential to consider releasing all detainees who do not pose an immediate risk to public safety.*”⁸ They also made their concerns public in an op-ed, explaining that screening incoming detainees and isolating groups exposed to the virus “won’t be enough” without rapidly “releas[ing] those who do not pose an immediate danger to public safety.”⁹

57. In the event that a scenario unfolds where vulnerable detainees have already been exposed to COVID-19, the DHS experts recommend the release of detainees to a quarantine setting outside of detention in coordination with local health authorities. Dr. Sandra Hernandez, a public health expert, has identified such release as consistent with the public health and the guidance and directives of state and local public health authorities.

LEGAL FRAMEWORK

Plaintiffs Have a Constitutional Right to Reasonable Safety in Custody.

58. Whenever the government detains or incarcerates someone, it has an affirmative duty to provide conditions of reasonable health and safety. As the Supreme Court has explained, “when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.” *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 199-200 (1989). As a result, the government must provide those in its custody with “food, clothing, shelter, medical care, and reasonable safety.” *Id.* at 200.

⁸ Letter from Scott A. Allen, MD and Josiah Rich, MD, MPH to Congressional Committee Chairpersons, dated Mar. 19, 2020, available at <https://assets.documentcloud.org/documents/6816336/032020-Letter-From-Drs-Allen-Rich-to-Congress-Re.pdf> (emphasis in original).

⁹ See, “We must release prisoners to lessen the spread of coronavirus,” Washington Post <https://www.washingtonpost.com/opinions/2020/03/17/we-must-release-prisoners-lessen-spread-coronavirus/>.

59. Conditions that pose an unreasonable risk of future harm violate the Eighth Amendment’s prohibition against cruel and unusual punishment, even if that harm has not yet come to pass. The Eighth Amendment requires that “inmates be furnished with the basic human needs, one of which is ‘reasonable safety.’” *Helling v. McKinney*, 509 U.S. at 33 (quoting *DeShaney*, 489 U.S. at 200). Accordingly, “[i]t would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them.” *Id.*

60. The Supreme Court has explicitly recognized that the risk of contracting a communicable disease may constitute such an “unsafe, life-threatening condition” that threatens “reasonable safety.” *Id.* The Supreme Court also has instructed courts to consider “contemporary standards of decency” when evaluating conditions of confinement. *Helling v. McKinney*, 509 U.S. 25, 36 (1993).

61. The constitutional protections afforded to immigration detainees are more comprehensive than those afforded to criminal defendants. Immigrant detainees, even those with prior criminal convictions, are *civil detainees* held pursuant to *civil* immigration laws. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Even those who in the past were convicted of crimes are solely being detained pursuant to their immigration status, having completed their criminal sentences. Because detained immigrants are civil detainees, their constitutional protections while in custody are derived from the Fifth Amendment. The Eighth Amendment prohibits punishment that is “cruel and unusual,” whereas the Due Process Clause of the Fifth Amendment prohibits *any punishment at all*.

62. The Ninth Circuit has applied this principle to make clear that civil detainees, like Plaintiffs here, are entitled to conditions of confinement that are superior to those of convicted prisoners and to those of criminal pretrial detainees. *Jones v. Blanas*, 393 F.3d 918, 933-34 (9th Cir. 2004), *cert. denied*, 546 U.S. 820 (2005); *see also King v. Cnty. of Los Angeles*, 885 F.3d 548, 557 (9th Cir. 2018) (finding presumption of punitive, and thus unconstitutional, treatment where conditions of confinement for civil detainees are similar to those faced by pre-trial criminal detainees). Conditions of confinement violate this standard when they deprive people in civil custody of a basic human need, including safety, and the risk of deprivation cannot be justified by a legitimate governmental interest or is excessive despite a legitimate governmental interest.

63. The risk that Plaintiffs fear—that the unsafe conditions in Mesa Verde and Yuba cause them to actually contract COVID-19, and that they will face a heightened risk of morbidity or mortality—does not

1 need to become a reality for there to be a violation of their constitutional rights. A Due Process violation may
2 arise, and a court may fashion remedies even *before* a plaintiff has contracted a communicable disease or
3 such disease has spread within a facility. *See Helling v. McKinney*, 509 U.S. 25, 33 (1993); *Lareau v.*
4 *Manson*, 651 F.2d 96, 105 (2d Cir. 1981); *Hernandez v. Cnty. of Monterey*, 110 F.Supp.3d 929, 957 (N.D.
5 Cal. 2015) (finding need for injunction where civil detainees kept at “heightened risk of contracting” a
6 communicable disease).

7 **ICE Has the Authority to Release Detained People in Its Custody.**

8 64. It is well within ICE’s authority to comply with these constitutional requirements by releasing
9 people to remedy the conditions of confinement in Mesa Verde and Yuba that put Plaintiffs and others
10 detained there at an unreasonably high risk of contracting COVID-19. In fact, ICE has routinely exercised
11 this discretion to release particularly vulnerable detainees like Plaintiffs. As former Deputy Assistant
12 Director for Custody Programs in ICE Enforcement and Removal Operations Andrew Lorenzen-Strait has
13 stated, “ICE has exercised and still exercises discretion for purposes of releasing individuals with serious
14 medical conditions from detention.” In fact, “ICE exercises humanitarian parole authority *all the time* for
15 serious medical reasons.” This exercise of discretion comes from a long line of agency directives explicitly
16 instructing officers to exercise favorable discretion in cases involving severe medical concerns and other
17 humanitarian equities militating against detention.

18 65. ICE’s discretion applies regardless of the statutory basis for a noncitizen’s detention.

19 66. When conditions of confinement in an immigration detention facility lead to uniformly unsafe
20 conditions that rise to the level of a constitutional violation, the only available remedy is to reduce levels of
21 detention unless and until conditions can be brought in line with constitutional standards. For example, in a
22 recent case challenging conditions of confinement in Border Patrol detention facilities along the Arizona
23 border, Judge David C. Bury ordered that the Constitution prohibited Border Patrol from continuing to detain
24 any person to whom it did not provide a bed, shower, nutritious food, and a screening by a medical
25 professional within 48 hours of book-in. *Unknown Parties v. Nielsen*, CV-15-00250-TUC-DCB, 2020 WL
26 813774, *1 (D. Az. Feb. 19, 2020).

1 **This Court Has Authority to Order Plaintiffs’ Release to Vindicate Their Fifth Amendment Rights,**
2 **and Such Relief Is Appropriate Here.**

3 67. While the circumstances of this case are novel and emerging, the Court’s authority to order
4 Plaintiffs’ release to ensure their constitutional rights are protected is not. “Federal courts possess whatever
5 powers are necessary to remedy constitutional violations because they are charged with protecting these
6 rights.” *Stone v. City & Cnty. of San Francisco*, 968 F.2d 850, 861 (9th Cir. 1992). As a result, “[w]hen
7 necessary to ensure compliance with a constitutional mandate, courts may enter orders placing limits on a
8 prison’s population.” *Brown v. Plata*, 563 U.S. 493, 511 (2011).

9 68. Courts have regularly exercised this authority to remedy constitutional violations caused by
10 overcrowding. *Duran v. Elrod*, 713 F.2d 292, 297-98 (7th Cir. 1983), *cert. denied*, 465 U.S. 1108 (1984)
11 (concluding that court did not exceed its authority in directing release of low-bond pretrial detainees as
12 necessary to reach a population cap).

13 69. The same principle applies here. As the constitutional principles and public health experts
14 make clear, releasing Plaintiffs is the only viable remedy to ensure their safety from the threat to their health
15 that COVID-19 poses. Plaintiffs are older adults and/or people with medical conditions who are at
16 particularly grave risk of severe illness or death if they contract COVID-19.

17 70. In the face of this great threat, social distancing and hygiene measures are Plaintiffs’ only
18 defense against COVID-19. Those protective measures are exceedingly difficult, if not impossible, in the
19 environment of an immigration detention center, where Plaintiffs share toilets, sinks, and showers, eat in
20 communal spaces, and are in close contact with the many other detainees and officers around them. These
21 conditions pose even greater risk of infectious spread, and as a result, Plaintiffs face unreasonable harm from
22 continued detention. It is also well documented that even in “normal” times, ICE has been ineffective in
23 ceasing the spread of communicable diseases within detention centers. And, these are not normal times.

24 **INJUNCTIVE AND DECLARATORY RELIEF ALLEGATIONS**

25 71. Plaintiffs repeat and reallege the allegations contained in all preceding paragraphs as though
26 fully set forth herein.

27 72. An actual and substantial controversy exists between Plaintiffs and Defendants regarding their
28 respective legal rights and duties. Plaintiffs contend that Defendants have violated Plaintiffs’ constitutional

1 rights as alleged above. Defendants deny that their conduct violates any such rights and intend to continue
2 such conduct.

3 73. Moreover, in view of Defendants' policies and practices, Plaintiffs are threatened with
4 continuing and future deprivations of their rights.

5 74. Defendants' conduct as alleged above has caused and, absent injunctive relief or a writ of
6 habeas corpus, will continue to cause irreparable harm to Plaintiffs by exposing Plaintiffs to unacceptably
7 increased risk of irreparable harm, including serious injury and death. In the absence of immediate relief,
8 Plaintiffs will continue to be deprived of these rights.

9 75. There is no adequate remedy at law for the continuing violations by Defendants of Class
10 members' constitutional and statutory rights.

11 **CLAIM FOR RELIEF**

12 **Violation of Fifth Amendment Right to Substantive Due Process (Unlawful Punishment; Freedom** 13 **from Cruel Treatment and Conditions of Confinement)**

14 76. Plaintiffs repeat and reallege the allegations contained in all preceding paragraphs as though
15 fully set forth herein.

16 77. The Fifth Amendment to the U.S. Constitution guarantees that civil detainees, including all
17 immigrant detainees, may not be subjected to punishment. The federal government violates this substantive
18 due process right when it subjects civil detainees to conditions of confinement that amount to punishment or
19 create an unreasonable risk to detainees' safety and health.

20 78. Defendants' conditions of confinement subject Plaintiffs to heightened risk of contracting
21 COVID-19, for which there is no vaccine, known treatment, or cure. Defendants are subjecting Plaintiffs to a
22 substantial risk of serious harm.

23 79. For these reasons, Defendants' ongoing detention of Plaintiffs constitutes punishment and
24 violates the Due Process Clause of the Fifth Amendment.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs respectfully ask this Court to grant the following relief:

1. Issue a Writ of Habeas Corpus and order the immediate release of Plaintiffs, with appropriate precautionary public health measures, on the ground that their continued detention violates the Due Process Clause;
2. In the alternative, issue injunctive relief ordering Defendants to immediately release Plaintiffs, with appropriate precautionary public health measures, on the grounds that their continued detention violates the Due Process Clause;
3. Issue a declaration that the conditions under which Plaintiffs and others are confined at Mesa Verde and Yuba place Plaintiffs at an unreasonable risk of contracting serious illness and death, in violation of the Due Process Clause;
4. Award Plaintiffs reasonable attorneys' fees, costs, and other disbursements in this action permitted under the Equal Access to Justice Act ("EAJA"), as amended, 5 U.S.C. § 504 and 28 U.S.C. § 2412, and on any other basis justified under law; and
5. Grant any and all other such relief that this Court deems just and equitable.

Dated: March 24, 2020

Respectfully submitted,

/s/ William S. Freeman

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