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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

JOSE ROBLES RODRIGUEZ; CHARLESTON EDWARD DACOFF; JOSE HERNANDEZ VELASQUEZ; LUIS LOPEZ SALGADO; PAOLA RAYON VITE; MARTIN VARGAS ARELLANO,

Petitioners-Plaintiffs,

v.

CHAD F. WOLF, Acting Secretary, U.S. Department of Homeland Security; MATTHEW T. ALBENCE, Deputy Director and Senior Official Performing the Duties of the Director, U.S. Immigration and Customs Enforcement; DAVID MARIN, Director of the Los Angeles Field Office, Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement; and JAMES JANECKA, Warden, Adelanto ICE Processing Center,

Respondents-Defendants.

Case No. 5:20-CV-00627

ADELANTO COVID

VERIFIED PETITION FOR WRIT OF HABEAS CORPUS AND COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

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**Pro hac vice* application forthcoming

***Pro hac vice* application forthcoming; not admitted in D.C., practice limited to federal courts

INTRODUCTION

1. Petitioners-Plaintiffs (Plaintiffs) are detained at the Adelanto ICE Processing Center ("Adelanto") and are highly vulnerable to serious illness and death from the COVID-19 global pandemic. Recognizing the gravity of the threat COVID-19 presents to Adelanto detainees, this Court recently ordered the immediate release of two noncitizens subject to immigration detention in Adelanto because of the enormous risk to their health and safety. *Castillo v. Barr*, TRO and Order to Show Cause ("*Castillo* TRO"), No. CV 20-605, Dkt. 32, at 11 (March 27, 2020). The Court should do the same here.

2. COVID-19 is a contagious disease that has spread like wildfire throughout the United States and the world. The number of confirmed cases and deaths rises exponentially by the day, including in the San Bernardino area. There is no specific treatment, vaccine, or cure for COVID-19, and no one is immune.

3. COVID-19 will soon reach Adelanto, if it has not already. The Plaintiffs in this case are civil detainees of Immigration and Customs Enforcement ("ICE") in Adelanto, who are currently housed in conditions that put them squarely at risk. They are a mix of older and younger adults, all with pre-existing medical conditions, such as human immunodeficiency virus (HIV), asthma, hepatitis C, diabetes, hypertension, and congestive heart failure, which make them particularly vulnerable to serious complications or death from COVID-19. They are being held in cramped conditions where "social distancing" and adequate hygiene are impossible.

4. Clustering vulnerable individuals under these circumstances and waiting for COVID-19 to explode at Adelanto creates not only a humanitarian crisis, but also a constitutional one. Courts have long recognized the Constitution forbids the government from allowing the people in its custody to suffer and die from infectious disease. The nature of the pandemic and the conditions of

confinement at Adelanto make it impossible for Respondents-Defendants ("Defendants") to protect Plaintiffs from risk of infection. That risk of harm is "so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk." *Helling v. McKinney*, 509 U.S. 25, 36 (1993).

5. Just days ago, this Court found that "[u]nder the Due Process Clause, a civil detainee cannot be subject to the current conditions of confinement at Adelanto," where there is "potential exposure . . . to a serious, communicable disease . . . [that is] very likely to cause a serious illness." *Castillo* TRO at 9 (quoting *Helling*, 509 U.S. at 32). Plaintiffs in this case are just as vulnerable as the petitioners in *Castillo*, and their health conditions place them at serious risk of life-threatening illness or death if they remain in Adelanto.

6. This Court is not alone in acting decisively in the face of this enormous public health threat. Around the country, courts, government officials, and prison systems are increasingly recognizing that release from detention is the only way to protect vulnerable detainees from COVID-19. Last week, a panel of the Ninth Circuit *sua sponte* ordered the immediate release from civil detention of an immigrant who is in removal proceedings, holding that release was necessary "[i]n light of the rapidly escalating public health crisis, which public health authorities predict will especially impact immigration detention centers." *Xochihua-Jaimes v. Barr*, No. 18-71460, 2020 WL 1429877, at *1 (9th Cir. Mar. 24, 2020). Most courts have reached the same conclusion. *See Coronel v. Decker*, 20-cv-2472, 2020 WL 1487274 (S.D.N.Y. Mar. 27, 2020) (ordering immediate release of four petitioners with chronic medical conditions on due process grounds); *Basank v. Decker*, No. 1:20-cv-02518, 2020 WL 1481503 (S.D.N.Y. Mar. 26, 2020) (same, for ten petitioners); *Jovel v. Decker*, 20 Civ. 308 (GBD) (SN), 2020 WL 1467397 (S.D.N.Y. Mar. 26, 2020) (ordering release of petitioner with unspecified medical problems within eight days unless bond hearing provided); *see also In re Extradition of Alejandro Toledo Manrique*, Case No.

19-mj-71055-MAG-1 (TSH), 2020 WL 1307109, at *1 (N.D. Cal. Mar. 19, 2020) (ordering the release of a 74-year old detainee after rejecting "the government's suggestion that [the plaintiff] should wait until there is a confirmed outbreak of COVID-19 in [the facility] before seeking release" as "impractical [because b]y then it may be too late"); *United States v. Perez*, 19 Cr. 297 (PAE), 2020 WL 1329225, at *1 (S.D.N.Y. Mar. 19, 2020) (ordering release of detainee with serious lung disease and other significant health problems); *United States v. Fellela*, No. 3:19-cr-79, 2020 U.S. Dist. LEXIS 49198, at *1 (D. Conn. Mar. 20, 2020) (ordering release of diabetic criminal defendant awaiting sentencing, even though there had been no confirmed COVID-19 cases in the facility and despite government's steps to prevent the spread of coronavirus); *United States v. Stephens*, 15-cr-95 (AJN), 2020 WL 1295155, at *2 (S.D.N.Y. Mar. 19, 2020) (releasing pretrial detainee in light of "the unprecedented and extraordinarily dangerous nature of the COVID-19 pandemic"); *People ex rel. Stoughton on behalf of Little et al. v. Brann*, Index No. 260154/2020 (Bronx Sup. Ct. Mar. 25, 2020) (ordering immediate release of 106 petitioners held at Rikers on a non-criminal technical parole violation who are older or have underlying medical conditions); *State v. Ferguson*, Order, No. 2019-270536-FH (Mich. Ct. App. Mar. 23, 2020) (ordering defendant's immediate release on bond due to "the public health factors arising out of the present public health emergency"); *In re Request to Commute or Suspend County Jail Sentences*, Dkt. No. 084230 (N.J. Mar. 22, 2020) (court consent order, creating immediate presumption of release for every person serving a county jail sentence based on COVID-19).

7. This Court has the authority to order Defendants to comply with the Fifth Amendment and release Plaintiffs from civil detention at Adelanto. For the reasons discussed below, the Court should require Defendants to temporarily release Plaintiffs from custody and give them the chance to avoid becoming infected with COVID-19, thereby avoiding the heightened risk of serious illness or

death that this infection would cause them.

JURISDICTION AND VENUE

8. Jurisdiction is proper and relief is available pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1346 (original jurisdiction), 5 U.S.C. § 702 (waiver of sovereign immunity), 28 U.S.C. § 2241 (habeas corpus jurisdiction), and Article I, Section 9, clause 2 of the United States Constitution (the Suspension Clause).

9. Venue is proper in the Central District of California under 28 U.S.C. § 1391, because at least one federal Defendant resides in this District, the Individual Plaintiffs are imprisoned in this District, and a substantial part of the events giving rise to the claims in this action took place in this District. Venue is also proper under 28 U.S.C. § 2243 because the immediate custodians of all the Individual Plaintiffs reside in this District.

PARTIES

Plaintiffs

10. Plaintiff Jose Robles Rodriguez is a 37-year-old citizen of Guatemala who has been detained by ICE at Adelanto since December 2019. Mr. Robles suffers from diabetes, high blood pressure, and high cholesterol. As a consequence of his health conditions, Mr. Robles has a high risk of serious illness or death if he contracts COVID-19.

11. Plaintiff Charleston Edward Dacoff is a 54-year-old citizen of Belize who has been detained by ICE at Adelanto since March 2017. Mr. Dacoff suffers from congestive heart failure, hypertension, and diabetes. Mr. Dacoff suffered a Code Blue (i.e. a life-threatening medical emergency) at Adelanto in 2017. As a consequence of his health conditions and age, Mr. Dacoff has a high risk of serious illness or death if he contacts COVID-19.

12. Plaintiff Luis Lopez Salgado is a 40-year-old citizen of Mexico who has been detained by ICE at Adelanto since August 2018. He has been diagnosed with HIV. As a consequence of his health condition, Mr. Lopez Salgado has a high risk of serious illness or death if he contracts COVID-19.

13. Plaintiff Paola Rayon Vite is a 35-year-old citizen of Mexico who has been detained by ICE at Adelanto since November 2019. She has been diagnosed with asthma and diabetes, the latter of which requires her blood sugar to be tested twice daily by Adelanto medical staff. As a consequence of her health conditions, Ms. Rayon Vite has a high risk of serious illness or death if she contracts COVID-19.

14. Plaintiff Jose Hernandez Velasquez is a 19-year-old citizen of Guatemala who has been detained by ICE at Adelanto since October 2018. Mr. Hernandez Velasquez has been diagnosed with hypertension and prescribed medication to lower his risk of a heart attack. As a consequence of his health conditions, Mr. Hernandez Velasquez has a high risk of serious illness or death if he contracts COVID-19.

15. Plaintiff Martin Vargas Arellano is a 54-year-old citizen of Mexico who has been detained by ICE at Adelanto since April 2019. Mr. Vargas Arellano suffers from diabetes, hypertension, and hepatitis C. As a consequence of his health conditions and age, Mr. Vargas Arellano has a high risk of serious illness or death if he contracts COVID-19.

Defendants

16. Defendant Chad F. Wolf is the Acting Secretary for DHS. In this capacity, he has responsibility for the administration of immigration laws pursuant to 8 U.S.C. § 1103(a), has authority over ICE and its field offices, and has authority to order the release of Plaintiffs. At all times relevant to this Complaint, Defendant Wolf was acting within the scope and course of his position as the Acting Secretary for DHS. Defendant Wolf is sued in his official capacity.

17. Defendant Matthew T. Albence is the Deputy Director and Senior Official Performing the Duties of the Director of ICE. Defendant Albence is responsible for ICE's policies, practices, and procedures, including those relating to the detention of immigrants. Defendant Albence is a legal custodian of Plaintiffs. At all times relevant to this Complaint, Defendant Albence was acting within the scope and course of his position as an ICE official. He is sued in his official capacity.

18. Defendant David Marin is the Director for the Los Angeles Field Office of Enforcement and Removal Operations ("ERO") within ICE, a federal law enforcement agency within the Department of Homeland Security ("DHS"). ERO is a division of ICE that manages and oversees the immigration detention system. In his capacity as Field Office Director for ERO, Defendant Marin exercises control over and is a custodian of immigration detainees held at Adelanto, including all Plaintiffs in this case. At all times relevant to this Complaint, Defendant Marin was acting within the scope and course of his employment with ICE. He is sued in his official capacity.

19. Defendant James Janecka is Warden of Adelanto in San Bernardino County, where all Plaintiffs are detained. Defendant Janecka is the immediate, physical custodian of Plaintiffs. He is named in his official capacity.

FACTUAL ALLEGATIONS

A. COVID-19 Poses Grave Risk of Harm, Including Serious Illness or Death, to Older Adults and Persons with Certain Medical Conditions.

20. COVID-19 is a disease caused by coronavirus that has reached pandemic status.

21. In the United States, more than 140,440 people have already tested positive for the virus, and more than 2,438 people have died. The United States

now has more confirmed cases than any other country in the world. In the Los Angeles metropolitan area, there are 2,567 confirmed cases and 41 known deaths. Since the Court entered the *Castillo* TRO three days ago, the number of confirmed cases in San Bernardino County has increased by ***73%***.

22. COVID-19 infects people who come into contact with respiratory droplets that contain the coronavirus, such as those produced when an infected person coughs or sneezes. Such droplets can spread between people even at a distance of up to six feet. The virus that causes COVID-19 is highly contagious and can survive for long periods on inanimate surfaces, making it inevitable that the disease will spread among communities where it appears.

23. There is no vaccine to prevent COVID-19. There is no known cure or FDA-approved treatment for COVID-19 at this time. The only known means of minimizing the risk of infection are social distancing and increased sanitization.

24. Critically, people over the age of fifty and those with certain medical conditions face greater chances of serious illness or death from COVID-19. The medical conditions that increase the risk of serious complications from COVID-19, for people of any age, include lung disease, heart disease, chronic liver or kidney disease (including hepatitis and dialysis), diabetes, asthma, epilepsy, hypertension, compromised immune systems (such as from cancer, HIV, or autoimmune disease), blood disorders (including sickle cell disease), inherited metabolic disorders, stroke, developmental delay, and pregnancy (current or recent).

25. In many people, COVID-19 causes fever, cough, and shortness of breath. But for people over the age of 50 or with medical conditions that increase the risk of the risk of serious COVID-19 infection, the shortness of breath can be severe.

26. COVID-19 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 cause inflammation of the heart muscle.

This is known as myocarditis; it 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.

27. Emerging evidence also suggests that COVID-19 can trigger an over-response of the immune system, further damaging tissue and potentially resulting in widespread damage to the body's organs, including permanent injury to the kidneys and neurologic injury.

28. These complications can develop at an alarming pace. Patients can show the first symptoms of infection within two days of exposure, and their condition can seriously deteriorate in five days or sooner.

29. The need for care, including intensive care, and the likelihood of death, is much higher from COVID-19 than from influenza.

30. Most people in higher risk categories who contract COVID-19 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.

31. The extensive degree of support that COVID-19 patients need can quickly exceed local health care resources. When healthcare systems are overwhelmed, doctors and public health authorities are inevitably left to allocate scarce resources regarding who receives care.

32. According to recent estimates, the fatality rate of people 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 is about 15 percent.

33. The only way to protect vulnerable people from serious health outcomes, including death, is to prevent them from being infected with the

coronavirus.

B. Conditions at Adelanto Detention Center Increases the Risk of COVID-19 Infection.

34. The conditions at ICE's Adelanto Detention Center contravene all medical and public health directives for risk mitigation of COVID-19.

35. Adelanto is an enclosed environment where contagious diseases can easily spread. People live in close quarters and are subject to security measures that make the "social distancing" that is needed to effectively prevent the spread of COVID-19 impossible.

36. This presents "ideal incubation conditions" for the rapid spread of COVID-19 if and when it is introduced into a facility. This has been demonstrated through the fact that enclosed group environments, like cruise ships or nursing homes, have become the sites for the most severe outbreaks of COVID-19. An alarmingly high person-to-person transmission rate for COVID-19 also took place at Rikers Island Jail, where, as of March 27, 2020, 103 inmates and 80 correctional officers have tested positive for the disease.

37. At Adelanto, many immigrant detainees live in dormitories (also known as "pods") that hold up to 100 detainees at a time. In these dormitories, detainees must share one large room for sleeping, eating, and socializing. Their beds are bunked and placed only a few feet apart. The dozens of detainees in each dormitory must share a relatively small number of sinks, toilets, and showers. Adelanto has the capacity to hold nearly 2,000 detainees.

38. Food preparation and food service is communal, with little opportunity for disinfection. Sinks, toilets, and showers are also shared. The showers are consistently dirty and infrequently sanitized.

39. Staff members, including medical staff, generally do not wear masks or other personal protective equipment (PPE) to combat the transmission of

COVID-19. Staff arrive and leave on a shift basis, and there is limited ability to adequately screen staff for new, asymptomatic infection.

40. Moreover, because detention facilities also limit access to items and services that are necessary to maintaining hygiene, such as hand sanitizer and clean clothes, the risk of disease spread is even higher. And typically, there is little to no instruction given to detainees regarding sanitation, including in response to the COVID-19 pandemic. At Adelanto, detainees have not been provided with hand sanitizer, gloves, or masks—nor have they been instructed about the need for social distancing. One of the Plaintiffs had never even heard of the term before her attorney inquired into the conditions in Adelanto on March 29, 2020. But in any event, social distancing is not possible in Adelanto.

41. Staff members are not monitoring detainees' temperatures or otherwise systemically testing for COVID-19.

42. Indeed, this Court just days ago found that conditions in Adelanto make it ripe for the spread of COVID-19:

> At Adelanto, a holding area can contain 60 to 70 detainees, with a large common area and dormitory-type sleeping rooms housing four or six detainees with shared sinks, toilets and showers. Guards regularly rotate through the various holding areas several times a day. At meal times – three times a day – the 60 to 70 detainees in each holding area line up together, sometimes only inches apart, in the cafeteria. The guards, detainees and cafeteria workers do not regularly wear gloves or masks to prevent the spread of the coronavirus. While detainees have access to gloves, there is no requirement that they wear them. Detainees do not have access to masks or hand sanitizer . . . .

Castillo TRO at 3–4.

43. The federal government itself has repeatedly found significant health and safety risks at Adelanto.

44. Dr. Robert Greifinger, a correctional health expert with over three decades of prisoner health care experience, attests that the crowded conditions at immigration detention centers like Adelanto make one of the most vital preventive measures, social distancing, impossible. Dr. Todd Schneberk, an emergency medical physician and professor of clinical emergency medicine with experience conducting and supervising multiple physical and psychological evaluations of detainees at Adelanto, explains that "detainees in Adelanto face a dramatically reduced ability to protect themselves by social distancing than they would in the community, and therefore face a significantly higher risk of being exposed to and infected by contagious infected diseases like COVID-19." Experts predict that it is "perhaps inevitable" that COVID-19 will reach immigration detention facilities like Adelanto, if it has not already.

45. This kind of rapid spread has already occurred in other facilities. For example, since its first confirmed case on March 22, 2020, Cook County Jail in Chicago has reported that 89 inmates and nine staff have confirmed cases of COVID-19. Test results are pending on another 92 detainees. Defendants have also acknowledged, in a March 15, 2020 guidance, the risks of COVID-19 infection to those in civil detention.

46. After reviewing the COVID-19 protocols announced by ICE, Dr. Greifinger concluded that the guidance is impractical and does not reflect the reality of the overcrowded conditions in immigration detention.

47. Although the ICE guidance suggests that "Detainees who meet CDC criteria for epidemiologic risk of exposure to COVID-19 are housed separately from the general population," the reality is that this practice is not being implemented. Close quarters, lack of testing, and inability to enforce social distancing are an urgent problem.

48. Similarly, the ICE guidance states that "[d]etainees who do not have fever or symptoms, but meet CDC criteria for epidemiologic risk, are housed

separately in a single cell, or as a group." However, experts, including Plaintiffs' correctional health expert, Dr. Greifinger, have concluded that cohorting vulnerable detainees together ***increases*** their risk of becoming infected with COVID-19.

49. Tellingly, the ICE guidance acknowledges that the options to safeguard vulnerable detainees "depend on available space." The evidence at Adelanto shows that immigration facilities simply do not have that space, and therefore are incapable of protecting Plaintiffs and other detainees from the risks of COVID-19.

50. Given the widespread shortage of COVID-19 testing in the United States, it is likely that detention facilities cannot conduct aggressive, widespread testing to identify all positive cases of COVID-19. For this reason, a lack of proven cases of COVID-19 in a context where testing is unavailable is functionally meaningless in determining whether there is a risk of COVID-19 transmission at an institution.

51. Without a rigorous testing regime, it is impossible to conclude that COVID-19 has not already entered Adelanto.

52. The coronavirus has already been confirmed in other ICE facilities: as of March 29, 2020, an ICE detainee in Bergen County Jail in New Jersey tested positive for COVID-19, and at least one ICE medical staff member tested positive for the virus. Moreover, an internal ICE COVID-19 report states that, as of March 19, 2020, ICE's Health Services Corps had isolated nine detainees and it was monitoring 24 more in ten different ICE facilities, and 1,444 officials with ICE and DHS were in precautionary self-quarantine.

C. Continued ICE Detention is Unsafe for Those Most Vulnerable to COVID-19.

53. Release from detention is the ***only*** option to protect vulnerable adults

from COVID-19 because of the above-described conditions at Adelanto. That fact has been recognized by public health experts and prison administrators alike.

54. Dr. Schneberk has concluded that "releasing detainees is the only effective means of preventing widespread infections at the [Adelanto] facility." As he explains, "Congregate settings such as Adelanto are nearly impossible to protect in scenarios such as this one, and it will be very difficult irrespective of the amount of sanitation and hygiene practices employed, to prevent spread in such a confined densely populated space" as Adelanto. For that reason, Dr. Schneberk recommends that "[a]t a *minimum*, Adelanto should immediately release all detainees in high risk medical groups," and opines that "[f]rom a public health perspective, the most effective action to combating COVID-19 would be to depopulate Adelanto" by evaluating individuals for release as quickly as possible, including those not identified as high-risk.

55. Dr. Dora Schriro, former Senior Advisor to DHS and founding Director of the ICE Office of Detention Policy and Planning, has also highlighted the increased risks of infection and death in ICE detention facilities, and recommended the release of medically vulnerable individuals, on appropriate conditions of supervision where necessary.

56. For similar reasons, multiple jurisdictions, including Los Angeles, CA, Chicago, IL, Harris County, TX, New York City, and the entire states of New Jersey and Iowa have also released thousands of people from criminal custody, acknowledging the grave threat that an outbreak in jails and detention centers pose.

57. Notably, other public officials have likewise called for the release of eligible individuals from detention.

58. The former Acting Director of ICE, John Sandweg, 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."

59. As early as February 25, 2020, Dr. Scott Allen and Dr. Josiah Rich, medical experts to DHS, specifically warned the agency about the danger to detainees of rapid spread of COVID-19 in immigration detention facilities.

60. In a whistleblower letter to Congress, Dr. Allen and Dr. Rich recommended that "[m]inimally, DHS should consider releasing all detainees in high risk medical groups such as older people and those with chronic diseases." They concluded that "acting immediately will save lives not of only those detained, but also detention staff and their families, and the community-at-large."

61. Thus, high risk individuals should be released from detention centers before it is too late.

D. Plaintiffs Must Be Released from ICE Custody Because They Are Particularly Vulnerable to Serious Illness or Death If Infected by COVID-19.

62. Each of the Plaintiffs has one or more underlying medical conditions that increases their risk of serious illness or death if exposed to COVID-19. They are detained at Adelanto as they await adjudication of their civil immigration cases.

63. Plaintiff Jose Robles Rodriguez is a 37-year-old citizen of Guatemala who has been detained by ICE at Adelanto since December 2019. Mr. Robles suffers from diabetes and hypertension. As a consequence of his health conditions, Mr. Robles has a high risk of serious illness or death if he contracts COVID-19.

64. Plaintiff Charleston Edward Dacoff is a 54-year-old citizen of Belize who has been detained by ICE at Adelanto since March 2017. Mr. Dacoff suffers from congestive heart failure and diabetes. Mr. Dacoff suffered a "Code Blue" at Adelanto in 2017, meaning he had a life-threatening medical emergency. As a consequence of his health conditions and age, Mr. Dacoff has a high risk of serious illness or death if he contacts COVID-19.

65. Plaintiff Luis Lopez Salgado is a 40-year-old citizen of Mexico who has been detained by ICE at Adelanto since August 2018. He has been diagnosed

with HIV. As a consequence of his health condition, Mr. Lopez Salgado has a high risk of serious illness or death if he contracts COVID-19.

66. Plaintiff Paola Rayon Vite is a 35-year-old citizen of Mexico who has been detained by ICE at Adelanto since November 2019. She has been diagnosed with asthma and diabetes, the latter of which requires her blood sugar to be tested twice daily by Adelanto medical staff. As a consequence of her health conditions, Ms. Rayon Vite has a high risk of serious illness or death if she contracts COVID-19.

67. Plaintiff Jose Hernandez Velasquez is a 19-year-old citizen of Guatemala who has been detained by ICE at Adelanto since October 2018. Mr. Hernandez Velasquez has been diagnosed with hypertension and prescribed medication to lower his risk of a heart attack. As a consequence of his health conditions, Mr. Hernandez Velasquez has a high risk of serious illness or death if he contracts COVID-19.

68. Plaintiff Martin Vargas Arellano is a 54-year-old citizen of Mexico who has been detained by ICE at Adelanto since April 2019. Mr. Vargas Arellano suffers from diabetes, hypertension, and hepatitis C. As a consequence of his health conditions and age, Mr. Vargas Arellano has a high risk of serious illness or death if he contracts COVID-19.

LEGAL FRAMEWORK

A. Immigrant Detainees are Entitled to Constitutional Due Process Protections Against Exposure to Infectious Disease.

69. 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.

70. Conditions that pose an unreasonable risk of future harm violate the Eighth Amendment's prohibition on 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*, 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.*

71. 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.*

72. These principles also apply in the context of immigration detention.

73. Immigrant detainees, regardless of prior criminal convictions, are *civil* detainees whose constitutional protections while in custody derive from the Fifth Amendment due process clause. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("government detention violates th[e Due Process] Clause unless the detention is ordered in a criminal proceeding with adequate procedural protections . . . or, in certain special and 'narrow' nonpunitive 'circumstances'" not present here).

74. 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. Cty. 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).

75. Moreover, because civil detention is governed by the Fifth Amendment rather than the Eighth Amendment, the "deliberate indifference" standard required to establish a constitutional violation in the latter context does not apply to civil detainees like Plaintiffs. *Jones*, 393 F.3d at 934. Instead, a condition of confinement for a civil immigration detainee violates the Constitution "if it imposes some harm to the detainee that significantly exceeds or is independent of the inherent discomforts of confinement and is not reasonably related to a legitimate governmental objective or is excessive in relation to the legitimate governmental objective." *Unknown Parties v. Johnson*, No. CV-15-00250-TUC-DCB, 2016 WL 8188563, at *5 (D. Ariz. Nov. 18, 2016), *aff'd sub nom. Doe v. Kelly*, 878 F.3d 710 (9th Cir. 2017).

B. Defendants Are Violating Plaintiffs' Constitutional Due Process Rights.

76. The conditions described above in Adelanto are sufficient to demonstrate that Plaintiffs' constitutional due process rights are being violated. Keeping at-risk Plaintiffs detained in such close proximity to one another and without the sanitation necessary to combat the spread of the virus serves no legitimate purpose. Nor is detention under these circumstances rationally related to the enforcement of immigration laws.

77. Plaintiffs' due process rights are also being violated because their conditions of confinement place them at serious risk of being infected with COVID-19 and Defendants are being deliberately indifferent to this critical safety concern.

78. There is no question that COVID-19 poses a serious risk to Plaintiffs. COVID-19 is highly contagious, and can cause severe illness and death. Plaintiffs are at a heightened risk because of their underlying health conditions.

79. Defendants are aware of and have completely disregarded the serious risk that COVID-19 poses to Plaintiffs. Medical experts for the Department of Homeland Security have also identified the risk of COVID-19 spreading to ICE detention centers. John Sandweg, a former acting director of ICE, has written publicly about the need to release nonviolent detainees because ICE detention centers "are extremely susceptible to outbreaks of infectious diseases" and "preventing the virus from being introduced into these facilities is impossible."

80. Moreover, prisons and jails around the country are already releasing non-violent detainees because the risk of contagion is overwhelming.

81. The circumstances of this case make clear that release is the only means to ensure compliance with Plaintiffs' due process rights. Public health information makes clear that the only way to prevent infection is through social distancing and increased hygiene, and that these measures are most imperative to protect individuals with underlying medical conditions. These measures are functionally impossible to implement under Adelanto's current conditions. The only course of action that can remedy these unlawful conditions is release from the detention centers, like Adelanto, where risk mitigation is impossible.

C. ICE Regularly Uses Its Authority to Release People Detained in Custody Because They Suffer Serious Medical Conditions.

82. ICE has a longstanding practice of humanitarian releases from custody. The agency has routinely exercised its authority to release particularly vulnerable detainees. As former Deputy Assistant Director for Custody Programs in ICE Enforcement and Removal Operations Andrew Lorenzen-Strait explains, "ICE has exercised and still exercises discretion for purposes of releasing both individuals with serious medical conditions and individuals who are vulnerable to medical harm."

83. ICE has a range of highly effective tools at its disposal to ensure that

individuals report for court hearings and other appointments, including conditions of supervision. For example, ICE's conditional supervision program, called ISAP (Intensive Supervision Appearance Program), relies on the use of electronic ankle monitors, biometric voice recognition software, unannounced home visits, employer verification, and in-person reporting to supervise participants. A government-contracted evaluation of this program reported a 99% attendance rate at all immigration court hearings and a 95% attendance rate at final hearings.

84. This exercise of discretion is based in the statute and regulations, and comes from a long line of agency directives explicitly instructing officers to exercise favorable discretion in cases involving severe medical concerns and other humanitarian equities militating against detention. For example, under 8 C.F.R. § 212.5(b)(1), ICE has routinely exercised its discretion to release particularly vulnerable detainees.

85. While ICE officers may be exercising discretion less frequently in recent years, the statutory and regulatory authority underlying the use of prosecutorial discretion in custodial determinations remains in effect.

86. Moreover, ICE has released noncitizens on medical grounds regardless of the statutory basis for a noncitizen's detention.

87. Here the Due Process Clause of the Fifth Amendment to the U.S. Constitution requires ICE to release detainees where civil detention has become punitive and where release is the only remedy to prevent this impermissible punishment. The fact that ICE has the authority to release immigrants from custody and has exercised this authority in the past indicates that the remedy Plaintiffs request is neither unprecedented nor unmanageable for the agency.

D. As recognized in *Castillo*, The Court Has Authority to Order Plaintiffs' Release to Vindicate Their Fifth Amendment Rights, and Such Relief Is Necessary Here.

88. Courts have broad power to fashion equitable remedies to address

constitutional violations in prisons, *Hutto v. Finney*, 437 U.S. 678, 687 n.9 (1978), and "[w]hen necessary to ensure compliance with a constitutional mandate, courts may enter orders placing limits on a prison's population," *Brown v. Plata*, 563 U.S. 493, 511 (2011).

89. The circumstances of this case make clear that release is the only means to ensure compliance with the Fifth Amendment's prohibition against punitive detention.

90. Plaintiffs' medical conditions put them at grave risk of severe illness or death if they contract COVID-19. Public health information makes clear that the only way to prevent infection is through social distancing and increased hygiene, and that these measures are most imperative to protect individuals with pre-existing medical conditions. Yet Defendants are detaining vulnerable Plaintiffs under conditions where they are forced into close contact with many other detainees and staff. By continuing detention in these circumstances, Defendants are subjecting Plaintiffs to unreasonable harm. The only course of action that can remedy these unlawful conditions is release from Adelanto, where risk mitigation is impossible.

CLAIM FOR RELIEF

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

91. Plaintiffs repeat and incorporate by reference all allegations above as though set forth fully herein.

92. The Fifth Amendment of the Constitution guarantees that civil detainees, including all immigrant detainees, may not be subjected to punishment. The federal government violates this substantive due process right when it fails to satisfy its affirmative duty to provide conditions of reasonable health and safety to the people it holds in its custody, and violates the Constitution when it fails to

provide for their basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety. The federal government also violates substantive due process when it subjects civil detainees to cruel treatment and conditions of confinement that amount to punishment.

93. By detaining Plaintiffs at Adelanto, Defendants are subjecting Plaintiffs to a heightened risk of contracting COVID-19, for which there is no vaccine and no cure. Plaintiffs are particularly vulnerable to serious medical complications from COVID-19 infection and are risk of illness and death as long as they are held in detention. By subjecting Plaintiffs to this risk, Defendants are maintaining detention conditions that amount to punishment and fail to ensure safety and health in violation of Plaintiffs' due process rights.

94. For these reasons, Defendants' ongoing detention of Plaintiffs violates the Due Process Clause.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully ask this Court to take jurisdiction over this actual controversy and:

a. Issue a Writ of Habeas Corpus on the ground that Plaintiffs' continued detention violates the Due Process Clause and order Plaintiffs' immediate release;

b. In the alternative, issue injunctive relief ordering Defendants to immediately release Plaintiffs, on the ground that their continued detention violates Plaintiffs' constitutional due process rights;

c. Issue a declaration that Defendants' continued detention in civil immigration custody of individuals at increased risk for severe illness, including all people over ages fifty and older and persons of any age with underlying medical conditions that may increase the risk of serious illness or death as a result of COVID-19, violates the Due Process Clause;

d. Award Plaintiffs their costs and reasonable attorneys' fees in this action under the Equal Access to Justice Act, as amended, 5 U.S.C. § 504 and 28 U.S.C. § 2412, and on any other basis justified under law; and,

e. Grant any other and further relief that this Court deems just and appropriate.

Respectfully submitted,

Dated: March 30, 2020

/s/ Jessica Karp Bansal
JESSICA KARP BANSAL
Counsel for Plaintiffs-Petitioners