

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA**

TOURE, *et al.*,

Petitioners-Plaintiffs,

v.

HOTT, *et al.*,

Respondents-Defendants.

Civil Action No.: 1:20-cv-00395

ORAL ARGUMENT REQUESTED

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR A TEMPORARY RESTRAINING ORDER
AND/OR PRELIMINARY INJUNCTION

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INTRODUCTION

Today's global pandemic of COVID-19 is the worst the world has seen since 1918. To date, nearly 1.7 million individuals worldwide have been diagnosed with COVID-19, and the United States is the worst hit country.¹ Many more are likely infected, especially in the United States where testing for the virus has been extremely limited. As of April 10, there are over 5,700 confirmed cases of COVID-19 in Virginia, and 149 deaths.² In response to this crisis, the State of Virginia has imposed a "shelter-in-place" order in an attempt to control the spread of the disease.³

Public health experts, including the Centers for Disease Control and Prevention ("CDC"), have instructed that the only effective way to reduce the risk of severe illness or death for vulnerable individuals is 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 as early as February 2020.⁴ Yet Respondents-Defendants ("Defendants") continue to detain thousands of individuals in

¹ Coronavirus disease 2019 (COVID-19) Situation Report – 83, World Health Organization (Apr. 12, 2020), *available at* https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200412-sitrep-83-covid-19.pdf?sfvrsn=697ce98d_4.

² Virginia Department of Health, COVID-19 Cases in Virginia (accessed Apr. 13, 2020), *available at* <http://www.vdh.virginia.gov/coronavirus/>.

³ Commonwealth of Virginia Office of the Governor, Executive Order No. Fifty-Five (2020), Temporary Stay At Home Order Due to Novel Coronavirus (COVID-19) (Mar. 30, 2020), *available at* [https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-55-Temporary-Stay-at-Home-Order-Due-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-55-Temporary-Stay-at-Home-Order-Due-to-Novel-Coronavirus-(COVID-19).pdf).

⁴ Letter from Dr. Scott Allen and Dr. Josiah Rich, Medical Experts for DHS, to House Comm. on Homeland Sec. (Mar. 19, 2020), *available at* <https://www.documentcloud.org/documents/6816336-032020-Letter-From-Drs-Allen-Rich-to-Congress-Re.html#document/p4/a557238>; Catherine E. Shoichet, *Doctors Warn of 'Tinderbox*

facilities in Virginia and across the country, including those at severe risk of serious illness or death if they were to contract COVID-19, despite the ready availability of community-based alternatives to detention such as release on conditions or on bond.

Petitioners-Plaintiffs (“Plaintiffs”) are nine individuals detained in ICE custody at two Virginia facilities, Farmville Detention Center and Caroline Detention Facility (the “Virginia Detention Facilities” or the “Facilities”) who, due to their age and pre-existing medical conditions, are particularly vulnerable to serious illness or death if infected by the coronavirus. While detained, it is impossible for Plaintiffs to engage in the necessary social distancing and hygiene practices to protect against infection because they eat, sleep, and otherwise live in close proximity to others, and because sanitary conditions in these facilities are poor, lacking sufficient, basic supplies such as soap and hand sanitizer.

Immigration detention centers are a hotbed for spread of the virus. Confirmed cases have begun to appear in several ICE detention centers.⁵ It is quite likely—if not certain—that many more detention centers already have unconfirmed COVID-19 cases.⁶ For at-risk individuals like Plaintiffs, protection from the virus is a matter of life or death. The danger posed by Plaintiffs’ continued civil detention during the COVID-19 pandemic is “so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk” and violates their

Scenario' if Coronavirus Spreads in ICE Detention, CNN (Mar. 20, 2020), available at <https://www.cnn.com/2020/03/20/health/doctors-ice-detention-coronavirus/index.html>.

⁵ U.S. Immigration and Customs Enforcement, ICE Guidance on COVID-19 (accessed Apr. 9, 2020), <https://www.ice.gov/coronavirus>.

⁶ *Coreas v. Bounds*, 8:20-cv-00780-TDC, Dkt. No. 56 (D. Md. Apr. 3, 2020) (noting that two Maryland ICE Detention Facilities had not tested anyone for COVID-19 and did not have any test kits despite detaining individuals who had exhibited symptoms).

constitutional right to safety in government custody. *Helling v. McKinney*, 509 U.S. 25, 36 (1993). Without this Court’s intervention, Plaintiffs will continue to face the imminent risk of severe illness or death. Release – which this Court, like many others who have already acted, is fully authorized to order – is the only meaningful way to protect Plaintiffs from grave, irreparable harm.

FACTUAL BACKGROUND

I. COVID-19 Poses a Grave Risk of Harm, Including Serious Illness or Death, to Older Individuals and Those with Certain Underlying Medical Conditions.

COVID-19 is a highly contagious disease that is easily transmitted through respiratory droplets, *see* Ex. 12, Greifinger Dec. ¶ 5, especially when one is within six feet of an infected individual, and in some cases within 27 feet.⁷ It can result in severe and widespread damage to lungs, heart, liver, or other organs. *Id.* at ¶ 1. In many cases, COVID-19 results in death. *Id.* Individuals who do not die from the disease may face prolonged recovery periods. *Id.* at ¶ 7. A patient’s condition can seriously deteriorate within days.⁸ People can also spread COVID-19 but be asymptomatic.⁹ Ex. 12, Greifinger Dec. ¶ 4.

⁷ Bourouiba, Lydia, Journal of the American Medical Association, *Turbulent Gas Clouds and Respiratory Pathogen Emissions: Potential Implications for Reducing Transmission of COVID-19* (Mar. 26, 2020), *available at* <https://jamanetwork.com/journals/jama/fullarticle/2763852?appId=scweb>.

⁸ Centers for Disease Control and Prevention, “Clinical Presentation” Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19) (Mar. 31, 2020) *available at* <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html>.

⁹ A study in Iceland, where COVID-19 testing is widespread, found that about half those who tested positive have no symptoms. Jason Gale, *Coronavirus Cases Without Symptoms Spur Call for Wider Tests*, Bloomberg (Mar. 22, 2020), *available at* <https://www.bloomberg.com/news/articles/2020-03-22/one-third-of-coronavirus-cases-may-show-no-symptom-scmp-reports>.

Individuals over 60 years old and those with certain medical conditions face greater chances of serious illness or death from COVID-19.¹⁰ *Id.* at ¶ 6. Certain underlying medical conditions increase the risk of serious COVID-19 disease for individuals of any age, including but not limited to blood disorders, chronic kidney or liver disease, compromised immune system, endocrine disorders, including diabetes, metabolic disorders, heart and lung disease, neurological and neurologic and neurodevelopmental conditions, and current or recent pregnancy. *Id.* at ¶ 8. Preliminary research suggests that 20% of people in high risk categories who contract COVID-19 have died. *Id.* at ¶ 6.

Most people in higher risk categories who develop serious disease will need advanced medical support. *Id.* at ¶ 7. This level of supportive care requires highly specialized equipment that is in limited supply. *Id.* This level of support is especially difficult to provide for individuals who are in a detained setting. Ex. 12, Greifinger Dec. ¶ 12.

There is no vaccine against COVID-19, nor any known medication to prevent or treat infection from the virus. Ex. 12, Greifinger Dec. ¶ 4. The only effective measure to reduce the risk of severe illness or death to vulnerable individuals is to practice regular social distancing (remaining physically separated from known or potentially infected individuals) and vigilant hygiene, including frequent washing hands with soap and water. *Id.*

II. Plaintiffs Are Particularly Vulnerable to Serious Illness or Death If Infected by COVID-19 Due to Their Age and Underlying Health Conditions.

¹⁰ CDC data shows that of persons whose chronic illness was known, 94% of those who have died had an underlying condition and 78% of those who have required admission to an intensive care unit have had an underlying condition. Joel Achenbach and William Wan, *New CDC Data Shows Danger of Coronavirus for Those With Diabetes, Heart or Lung Disease, Other Chronic Conditions*, Washington Post (Mar. 31, 2020), available at https://www.washingtonpost.com/health/new-cdc-data-on-underlying-healthconditions-in-coronavirus-patients-who-need-hospitalization-intensivecare/2020/03/31/0217f8d2-7375-11ea-85cb-8670579b863d_story.html.

Plaintiffs in this case are nine individuals who are at least 60 years old or have underlying conditions such as asthma, diabetes, hypertension, or other illnesses that make them particularly vulnerable to serious illness or death if they contract COVID-19.¹¹ Ex. 12, Greifinger Dec. ¶ 28; *see also* Ex. 13, Gupta Decl. ¶ 26-27.

- **Francois Toure.** Mr. Toure is a citizen of Guinea who is currently detained at the Farmville Detention Center. Ex. 2, ElGammal Dec. ¶ 3. Mr. Toure suffers from asthma, which requires the use of an inhaler, and borderline diabetes. *Id.* at ¶¶ 8-11. Mr. Toure also has major depressive disorder and has attempted suicide three times in the last three months. *Id.* at ¶ 13. As of March 27, 2020, Mr. Toure was feeling sick with symptoms including a cough, headaches, and fatigue. *Id.* at ¶ 14. Doctors at the Farmville Detention Center said he was suffering from some kind of virus but did not confirm which virus. *Id.* His blood test also revealed that his liver was functioning poorly, and doctors are concerned he may have liver disease. *Id.* Mr. Toure is critically vulnerable to the coronavirus and to serious illness or death from COVID-19 because of his physical and mental health conditions. *Id.* at ¶ 10-11; Ex. 12, Greifinger Dec. ¶ 28.a.
- **Sisira Kumara Kumaragamage Don.** Mr. Kumaragamage Don is a 64-year-old citizen of Australia who is currently detained at Farmville Detention Center. Ex. 3, Kumaragame Dec. ¶ 1. Mr. Kumaragamage Don suffers from diabetes and hypertension. *Id.* at ¶ 6. He has a weak immune system and gets sick easily, often with serious symptoms. *Id.* Mr. Kumaragamage Don is critically vulnerable to the coronavirus and to serious illness or death from COVID-19 because of his medical conditions and age. Ex. 12, Greifinger Dec. ¶ 28.b.
- **Venacio Escobar Andasol.** Mr. Escobar Andasol is a 65-year-old citizen of El Salvador who is currently detained at Caroline Detention Facility. Ex. 4, Schmelzel Dec. ¶¶ 5-6. Due to his age, he is at high risk of severe illness or death if he contracts COVID-19. *Id.* at ¶ 4; Ex. 12, Greifinger Dec. ¶ 28.c.
- **Franklin Alberto (Rechelle) Hernandez.** Rechelle is a transgender woman from Honduras who is currently detained at Caroline Detention Facility. Ex. 5, Dionne-Lanier Dec. ¶¶ 2, 4. Rechelle suffers from asthma, and takes five prescription medications daily. *Id.* at ¶ 7. Rechelle is critically vulnerable to the coronavirus and to serious illness or death from COVID-19 because of her asthma. *Id.* at ¶ 8; Ex. 12, Greifinger Dec. ¶ 28.d.
- **Ronaldo Lopez Cristales.** Mr. Lopez Cristales is a citizen of Guatemala who is currently detained at Caroline Detention Facility. Ex. 6, Chacon Dec. ¶¶ 5-6. He suffers from severe Type II diabetes and hypertension. *Id.* at ¶ 6. He goes to the clinic at the facility twice a day to receive his prescription medications to treat those conditions. *Id.* Mr. Lopez Cristales

¹¹ *Id.*

is critically vulnerable to the coronavirus and to serious illness or death from COVID-19 because of his diabetes and hypertension. Ex. 12, Greifinger Dec. ¶ 28.e.

- **Miguel Angel Chavez Ramos.** Mr. Chavez Ramos is a citizen of El Salvador who is currently detained at Caroline Detention Facility. Ex. 7, Julien Dec. ¶ 3. He suffers from severe Type II diabetes, for which he had to be hospitalized in November 2019. *Id.* at ¶¶ 8-9. Mr. Chavez Ramos receives daily insulin injections and pills, and still often feels ill. *Id.* at ¶ 10. Mr. Chavez Ramos is critically vulnerable to the coronavirus and to serious illness or death from COVID-19 because of his diabetes. *Id.* at ¶ 8; Ex. 12, Greifinger Dec. ¶ 28.f.
- **Melvin Castro.** Mr. Castro is a citizen of El Salvador who is currently detained at Caroline Detention Facility. Ex. 8, Schmelzel Dec. ¶ 6. He suffers from asthma. *Id.* at ¶ 7. Mr. Castro uses an inhaler regularly for his asthma and often feels very short of breath. *Id.* at ¶¶ 8-10. Mr. Castro is critically vulnerable to the coronavirus and to serious illness or death from COVID-19 because of his asthma and mental health conditions. *Id.* at ¶ 7; Ex. 12, Greifinger Dec. ¶ 28.g.
- **Ummu Ismail Mohamed.** Ms. Mohamed is a citizen of Tanzania who is currently detained at Caroline Detention Facility. Ex. 9, Wardlaw Dec. ¶ 3. She suffers from asthma, PTSD, severe depression disorder, and moderate anxiety disorder. *Id.* at ¶¶ 9, 16. Her asthma has worsened in detention; she now has difficulty breathing on a daily basis. *Id.* at ¶ 13. She has been experiencing flu-like symptoms every day for the past two weeks including feeling feverish all the time, body sweats, and exhaustion. *Id.* at ¶ 15. Ms. Mohamed is critically vulnerable to the coronavirus and to serious illness or death from COVID-19 because of her asthma and mental health conditions. *Id.* at ¶¶ 9, 16; Ex. 12, Greifinger Dec. ¶ 28.h.
- **Faustino Romero Aguilon.** Mr. Aguilon is a citizen of Guatemala who is currently detained at Caroline Detention Facility. Ex. 10, Aguilon Dec. ¶ 2. He suffers from Type II diabetes and hypertension and takes multiple medications to treat his conditions. *Id.* at ¶¶ 4, 6. Mr. Aguilon is critically vulnerable to the coronavirus and to serious illness or death from COVID-19 because of his health conditions. *Id.* at ¶ 15; Ex. 12, Greifinger Dec. ¶ 28.i.

III. People Detained at Virginia Detention Facilities Face an Imminent and Substantial Risk of Contracting COVID-19.

The Farmville Detention Center and Caroline Detention Facility are located in the state of Virginia,¹² which is experiencing a coronavirus outbreak and has instituted a “stay-at-home”

¹² Detention Facility Locator, U.S. Immigration and Customs Enforcement, *available at* <https://www.ice.gov/detention-facilities>.

order.¹³ Ex. 13, Gupta Decl. ¶ 10. On March 7, 2020, Virginia confirmed its first case of COVID-19.¹⁴ As of April 13, 2020, there were over 5,700 COVID-19 cases and nearly 150 deaths in the state, and the numbers are rising dramatically.¹⁵ According to some estimates, the COVID-19 epidemic will reach its peak in Virginia in less than two weeks and may result in as many as 2,000 deaths across the state by August 4, 2020. *Id.* at ¶ 12-13. Virginia is one of 20 states in the country estimated to experience a shortage of ICU beds during the state's expected COVID-19 peak. *Id.* at ¶ 14-15. COVID-19 has spread to prisons, jails and immigrant detention centers across the United States, including in at least two prisons in Virginia.¹⁶ There is an immediate and impending threat that COVID-19 will become widespread in the Virginia Detention Facilities. Ex. 12, Greifinger Dec. ¶¶ 10, 15-16, 18-19; Ex. 13, Gupta Decl. ¶ 19, 21, 22.

¹³ Commonwealth of Virginia Office of the Governor, Executive Order No. Fifty-Five (2020), Temporary Stay At Home Order Due to Novel Coronavirus (COVID-19) (Mar. 30, 2020), *available at* [https://www.governor.virginia.gov/media/governorviriniagov/executive-actions/EO-55-Temporary-Stay-at-Home-Order-Due-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorviriniagov/executive-actions/EO-55-Temporary-Stay-at-Home-Order-Due-to-Novel-Coronavirus-(COVID-19).pdf).

¹⁴ Virginia Department of Health, *First Virginia Case of COVID-19 Confirmed at Fort Belvoir* (Mar. 7, 2020), *available at* <http://www.vdh.virginia.gov/blog/2020/03/07/first-virginia-case-of-covid-19-confirmed-at-fort-belvoir/>.

¹⁵ Virginia Department of Health, COVID-19 Cases in Virginia (accessed Apr. 13, 2020), *available at* <http://www.vdh.virginia.gov/coronavirus/>.

¹⁶ Kerri O'Brien, *Another Inmate At Another State Prison Positive for COVID-19*, ABC8 (WRIC TV) News, (Apr. 1, 2020), *available at* <https://www.wric.com/news/virginia-news/new-fears-in-virginia-as-covid-19-is-now-behind-bars/> (confirmed cases in two VA prisons). *See also* Miranda Bryant, *Coronavirus Spread at Rikers is A 'Public Health Disaster', Says Jail's Top Doctor*, The Guardian (Apr. 1, 2020), *available at* <https://www.theguardian.com/us-news/2020/apr/01/rikers-island-jail-coronavirus-public-health-disaster> (Rikers Island in New York City has seen the number of cases spike from one to nearly 200 in twelve days); Greg LaRose, *Oakdale Federal Prison Stops Testing Inmates With COVID-19 Symptoms*, WSDU News (Mar. 31, 2020) *available at* <https://www.wdsu.com/article/oakdale-federal-prison-stops-testing-inmates-with-covid-19-symptoms/31989498> (due to rapid spread of COVID-19 inside Oakdale Federal Correctional Center, officials are presuming anyone who shows symptoms is positive of COVID-19).

Although ICE has not reported any confirmed COVID-19 cases in either Virginia facility, both facilities are holding individuals who are currently showing symptoms of COVID-19. *See* Ex. 2, ElGammal Dec. ¶¶ 5-6, 14; Ex. 3, Kumaragame Dec. ¶ 5; Ex. 7, Julien Dec. ¶ 5; Ex. 9, Wardlaw Dec. ¶ 15. One dormitory at Caroline Detention Facility was recently placed under quarantine because a recently detained individual presented symptoms of COVID-19. Ex. 5, Dionne-Lanier Dec. ¶ 6, Ex. 8, Schmelzel Dec. ¶ 3; Ex. 9, Wardlaw Dec. ¶ 8; Ex. 11, Warmeling Dec. ¶ 13. According to guards, there have been five potential cases of COVID-19 at Farmville Detention Center and it is unclear what results of those test are. Ex. 2, ElGammal Dec. ¶ 5. One dormitory at Farmville is also under quarantine.¹⁷ Staff arrive and leave on a shift basis, and even asymptomatic staff could carry the infection into the facility. Ex. 2, ElGammal Dec. ¶ 7; Ex. 8, Schmelzel Dec. ¶ 4; Ex. 11, Warmeling Dec. ¶ 12. The facilities have also had recent transfers of new people. Ex. 6, Chacon Dec. ¶ 10; Ex. 7, Julien Dec. ¶ 6; Ex. 11, Warmeling Dec. ¶ 12.

Given the rapid spread of COVID-19 throughout the state of Virginia, daily entry of staff and guards from the community, and the continued influx and transfer of new people into detention facilities, it is only a short matter of time before the disease becomes widespread among people detained in the Virginia Detention Facilities. Ex. 12, Greifinger Dec. ¶¶ 13, 15. In fact, in the absence of widespread testing, there is no way to be certain that outbreaks are not already occurring.¹⁸ Ex. 12, Greifinger Dec. ¶ 21.

¹⁷ Marissa J. Lang, 'It's a Time Bomb': ICE Detainees Seek Release Amid Growing Coronavirus Fears, *Washington Post* (Apr. 8, 2020), available at https://www.washingtonpost.com/local/ice-coronavirus-detention-centers-release/2020/04/08/f4dcaef8-74ee-11ea-87da-77a8136c1a6d_story.html.

¹⁸ *Coreas v. Bounds*, 8:20-cv-00780-TDC, Dkt. No. 56 (D. Md. Apr. 3, 2020) (noting concerns that two Maryland ICE Detention Facilities had not tested anyone for COVID-19 and did not have any test kits despite detaining individuals who had exhibited symptoms).

Neither Facility is equipped to enforce social distancing and improved hygiene in order to reduce the risk of severe illness or death for vulnerable individuals. Ex. 12, Greifinger Dec. ¶ 18. In both Facilities, groups of detained individuals are housed together and use common spaces together, sharing tables, telephones, and bathrooms. Ex. 3, Kumaragame Dec. ¶ 5; Ex. 4, Schmelzel Dec. ¶ 3; Ex. 5, Dionne-Lanier Dec. ¶ 5; Ex. 6, Chacon Dec. ¶ 4; Ex. 7, Julien Dec. ¶¶ 5-7; Ex. 8, Schmelzel Dec. ¶ 8; Ex. 9, Wardlaw Dec. ¶ 5; Ex. 10, Aguilon Dec. ¶ 3; Ex. 11, Warmeling Dec. ¶¶ 4-6. The dormitories in both detention centers house many individuals in close quarters, well under six feet apart. Individuals detained at Farmville share bunk beds in a large open dormitory typically housing 40 to 85 people. Ex. 11, Warmeling Dec. ¶ 4-5. At Caroline, individuals are housed together in groups, with typically four individuals in each cell and many cells in each dormitory. *Id.* at ¶ 5. In both detention facilities, it is impossible to eliminate all shared spaces and nearly impossible to ensure that individuals are maintaining adequate social distancing from one another. *Id.* at ¶ 6; Ex. 12, Greifinger Dec. ¶¶ 11, 18, 20; Ex. 13, Gupta Decl. ¶ 23.

Detained people are also unable to take vigilant hygiene measures to prevent infection. In both Facilities, communal areas, including bathrooms, are limited in number, shared by large numbers of people, and not sanitized or disinfected regularly. Ex. 2, ElGammal Dec. ¶ 6; Ex. 5, Dionne-Lanier Dec. ¶ 5; Ex. 6, Chacon Dec. ¶ 4; Ex. 8, Schmelzel Dec. ¶ 3; Ex. 10, Aguilon Dec. ¶ 9; Ex. 11, Warmeling Dec. ¶ 5. While some detained individuals are provided protective gear such as masks and gloves (for example when doing cleaning work), in general people have not been provided any protective gear upon request. Ex. 2, ElGammal Dec. ¶ 7; Ex. 5, Dionne-Lanier Dec. ¶ 6; Ex. 6, Chacon Dec. ¶ 8; Ex. 8, Schmelzel Dec. ¶ 4; Ex. 9, Wardlaw Dec. ¶ 6; Ex. 10, Aguilon Dec. ¶ 9; Ex. 11, Warmeling Dec. ¶¶ 10-13. At Caroline Detention Facility, alcohol-based sanitizers are not provided to people who are detained. Ex. 10, Aguilon Dec. ¶ 9. On March 26,

2020, Caroline was out of soap and shampoo in at least one dormitory and failed to provide more supplies to detained individuals in that dorm. Ex. 11, Warmeling Dec. ¶ 14.

Further, the Facilities are ill-equipped to manage an infectious disease outbreak. Each facility has a limited number of medical and disciplinary isolation units, which are shared spaces. Ex. 2, ElGammal Dec. ¶ 15 Ex. 4, Schmelzel Dec. ¶ 7; Ex. 5, Dionne-Lanier Dec. ¶ 13; Ex. 6, Chacon Dec. ¶ 4; Ex. 7, Julien Dec. ¶ 12; Ex. 8, Schmelzel Dec. ¶ 11; Ex. 9, Wardlaw Dec. ¶¶ 14-15, 17. This makes both containing the illness and caring for those who have become infected much more difficult. The Virginia Facilities “simply cannot handle the volume of patients that would need [the] level of monitoring” required to respond to COVID-19. Ex. 12, Greifinger Dec. ¶ 25.

At present, there are individuals in both Facilities who are exhibiting symptoms of COVID-19 and many of them have not been tested. Ex. 2, ElGammal Dec. ¶¶ 5-6, 14; Ex. 3, Kumaragame Dec. ¶ 5; Ex. 7, Julien Dec. ¶ 5; Ex. 9, Wardlaw Dec. ¶ 15. The facilities have also provided little to no useful information about COVID-19 to those who are detained there. Ex. 6, Chacon Dec. ¶ 7; Ex. 8, Schmelzel Dec. ¶ 5; Ex. 9, Wardlaw Dec. ¶ 7; Ex. 10, Aguilon Dec. ¶ 9; Ex. 11, Warmeling Dec. ¶ 15. Because of these conditions, detained people in Farmville are engaged in a hunger strike, protesting their continued detention in the midst of the COVID-19 pandemic. Kumaragame Dec. ¶ 5; Ex. 11, Warmeling Dec. ¶ 17.

Despite widespread warnings from public health officials, ICE and the Virginia Detention Facilities remain woefully unprepared and incapable of taking necessary precautions to protect people in their custody against a life-threatening illness. Ex. 12, Greifinger Dec. ¶ 17-18.

IV. ICE’s Plan for COVID-19 is Insufficient to Prevent the Spread and Management of COVID-19 in Detention Facilities.

Once one person in a detention facility contracts the virus, it spreads quickly because detained individuals live, sleep, eat, and use the bathroom in close proximity with others, and because “[b]ehind bars, some of the most basic disease prevention measures are against the rules or simply impossible.”¹⁹ In the United States and in Virginia, the most concentrated instance of death from the virus occurred in a confined institutional setting.²⁰ Ex. 13, Gupta Decl. ¶ 21. Similar to those settings, the Virginia Detention Facilities are fundamentally ill-equipped to handle large numbers of cases once people begin getting sick. The only way to mitigate the risk of spread is release of high-risk individuals like Plaintiffs from detention.²¹ Ex. 12, Greifinger Dec. ¶ 29.

¹⁹ Keri Blakinger and Beth Schwartzapfel, *When Purell is Contraband, How Do You Contain Coronavirus?*, the Marshall Project (Mar. 6, 2020), available at <https://www.themarshallproject.org/2020/03/06/when-purell-is-contraband-how-do-you-contain-coronavirus>.

²⁰ Maria Sacchetti & Jay Greene, *As Coronavirus Quietly Spread, A Nondescript Nursing Home Became The Deadliest Hot Spot in the U.S.*, The Washington Post (Mar. 7, 2020), available at https://www.washingtonpost.com/national/as-coronavirus-quietly-spread-a-nondescript-nursing-home-became-the-deadliest-hot-spot-in-the-us/2020/03/06/5d788a26-5f47-11ea-9055-5fa12981bbbf_story.html.

²¹ ICE’s official guidance states that the agency is purportedly “evaluat[ing] its detained population based upon the CDC’s guidance for people who might be at higher risk for severe illness as a result of COVID-19 to determine whether continued detention was appropriate.” See U.S. Immigration and Customs Enforcement, ICE Guidance on COVID-19 (accessed Apr. 9, 2020), <https://www.ice.gov/coronavirus>. On April 4, 2020, ICE issued a guidance to its Field Offices which additionally requires ICE Field Offices to review medically vulnerable individuals, including those over age 60 and those with “chronic diseases which would make them immune-compromised” and consider releasing those individuals. See COVID-19 Detained Docket Review from Peter B. Berg, Assistant Director, Field Operations to ICE Field Office Directors and Deputy Field Office Directors (Apr. 4, 2020), available at <https://www.yumpu.com/en/document/read/63213517/ecf-14-1-decl>. But Plaintiffs have no indication that this “review” of medically-vulnerable individuals is having any effect at all. Indeed, all of the Plaintiffs have conditions that require review under this policy, but none has been released.

Furthermore, ICE’s COVID-19 protocol is clearly insufficient to prevent infection and a subsequent outbreak.²² *Id.* at ¶ 17. As described in more detail below, the measures ICE is taking in response to COVID-19 are inadequate to prevent the spread of the virus in the Virginia Detention Facilities. Without taking the “extraordinary measures” that public health officials have recommended to ensure social distancing and hand hygiene in these facilities, Plaintiffs will continue to remain at risk of severe illness or death. *Id.* at ¶ 9.

Although ICE has temporarily suspended social visitation in all detention facilities, staff, contractors, and vendors continue to arrive and leave the detention centers.²³ *Id.* at ¶ 22. Detained individuals are also frequently transported to, from, and between facilities. There have been new transfers at least as recently as Tuesday, March 24th in the Virginia Detention Facilities. Ex. 11, Warmeling Dec. ¶ 12. Given the general lack of available testing, it is impossible for detention facilities to consistently and adequately screen detained individuals and staff for new, asymptomatic infection. Ex. 12, Greifinger Dec. ¶ 21. As mentioned above, detained individuals, including some Plaintiffs, in the Virginia Detention Facilities are showing symptoms but have not been tested. *Id.*

Instead of adequate testing, one measure ICE is seemingly taking is to segregate those who meet CDC criteria for epidemiologic risk of exposure to COVID-19.²⁴ This is inadequate to prevent the detection and spread of COVID-19. *Id.* at ¶ 25. Since some COVID-19 carriers can be

²² See U.S. Immigration and Customs Enforcement, ICE Guidance on COVID-19 (accessed Apr. 9, 2020), <https://www.ice.gov/coronavirus>.

²³ *Id.*

²⁴ *Id.* (“Detainees who meet CDC criteria for epidemiologic risk of exposure to COVID-19 are housed separately from the general population.”).

asymptomatic or not show symptoms for weeks after exposure, “screening people based on observable symptoms is just a game of catch up.” *In re Extradition of Alejandro Toledo-Manrique*, No. 19-mj-71055, 2020 WL 1307109 (N.D. Cal. March 19, 2020) (ordering release on bond in part because government’s COVID-19 management plan did not “say anything about testing”). Even putting that aside, the Virginia Detention Facilities are not equipped to isolate individuals who contract COVID-19. Even assuming ICE has adequate space in their detention facilities to segregate such individuals, isolating people in this manner is an ineffective way to prevent transmission because, except in specialized negative pressure rooms, air continues to flow outward from rooms to the rest of the facility. *Id.* at ¶ 26.

According to Dr. Greifinger, a physician who has worked in health care for incarcerated and detained persons for over 30 years and served as an independent consultant for several government agencies, including DHS, in order “[t]o protect high-risk individuals, ICE would need to include an improved intake process, cohorted housing areas for individuals in various risk categories, increased infection control measures, and increased medical surveillance, including daily checks for signs and symptoms.” *Id.* ¶ 23. By failing to take these steps, “[t]he Virginia Facilities are not following relevant CDC guidance.” *Id.*

The Office of the Inspector General (“OIG”) of the Department of Homeland Security (“DHS”) even concluded in a 2019 report that ICE “does not adequately hold detention facility contractors accountable for not meeting performance standards,” “issued waivers to facilities with

deficient conditions, seeking to exempt them from complying with certain standards,” and “does not adequately share information about ICE detention contracts with key officials.”²⁵

Immigration detention facilities have faced outbreaks of other infectious diseases in recent years due to overcrowding, poor hygiene measures, medical negligence, and poor access to resources and medical care. Last year, Farmville Detention Center had an outbreak of mumps in its facility with at least 24 people infected.²⁶ The facility mismanaged the handling of that outbreak in several respects. Despite mumps being an illness for which there is a vaccine, detained individuals were not provided vaccines. The entire detention center was eventually placed under quarantine even though the outbreak was limited to a few dorms. Some individuals in the dorm engaged in a hunger strike in response to these conditions.²⁷ Therefore, ICE and the Virginia Detention Facilities have a history of insufficient responses to viral outbreaks, even ones with a readily-available vaccine or cure.

Given the rapid community spread of COVID-19, variability in symptoms and the likelihood of it being spread before a patient is symptomatic, lack of available testing, and ICE’s past and present failure to meet adequate standards for containment and treatment of infectious diseases, Defendants cannot reliably prevent the spread of the virus in their detention facilities.

V. People Most Vulnerable to COVID-19 Should Be Released from ICE Detention.

²⁵ See Office of Inspector General, *ICE Does Not Fully Use Contracting Tools to Hold Detention Facility Contractors Accountable for Failing to Meet Performance Standards*, 1 (Jan. 29, 2019), available at <https://www.oig.dhs.gov/sites/default/files/assets/2019-02/OIG-19-18-Jan19.pdf>.

²⁶ Emma Ockerman, *Migrant Detention Centers Are Getting Slammed with Mumps and Chickenpox*, Vice News (Jun. 14, 2019), available at https://www.vice.com/en_us/article/mb8k5q/migrant-detention-centers-are-getting-slammed-with-mumps-and-chicken-pox.

²⁷ *Id.*

The only viable public health strategy currently available in the United States is risk mitigation, and therefore those in immigration detention most vulnerable to serious injury should they contract COVID-19 must be released.

Public health experts with experience in immigration detention and correctional settings have recommended the release of vulnerable people from custody. Two medical experts for DHS sent a warning to the agency in February that keeping people detained poses “an imminent risk to the health and safety of immigration detainees” and to the general public.²⁸ Dr. Greifinger has concluded that “only viable public health strategy available is risk mitigation” of which “release of high-risk individuals is a key part.” Ex. 12, Greifinger Dec. ¶ 29; *see also id.* at ¶ 16. Releasing the most vulnerable people, such as Plaintiffs, would also reduce the burden on the Virginia Facilities’ limited health care infrastructure as well as regional hospitals and health centers. *Id.* at ¶ 30. In case of an outbreak at a detention center, those institutions would bear the brunt of having to treat infected individuals from detention centers and would have fewer medical resources available for the general population. *Id.* Despite these warnings, ICE has not released vulnerable individuals like Plaintiffs from its detention facilities.

Where prison or detention officials have been slow to act, other decisionmakers have intervened to protect the health and safety vulnerable individuals. Governments worldwide have recognized the threat posed by the spread of COVID-19 among detained and incarcerated populations and have released people for that reason. For example, Iran temporarily released more

²⁸ Letter from Dr. Scott Allen and Dr. Josiah Rich, Medical Experts for DHS, to House Comm. on Homeland Sec. (Mar. 19, 2020), *available at* <https://www.documentcloud.org/documents/6816336-032020-Letter-From-Drs-Allen-Rich-to-Congress-Re.html#document/p4/a557238>; Catherine Shoichet, *Doctors Warn of “Tinderbox Scenario” If Coronavirus Spreads in ICE Detention*, CNN.com, (Mar. 20, 2020), *available at* <https://www.cnn.com/2020/03/20/health/doctors-ice-detention-coronavirus/index.html>.

than 80,000 detained individuals to curb the spread of the virus.²⁹ In the United States, several jurisdictions have also released detained individuals for the same reasons.³⁰

Furthermore, numerous courts across the country have recognized the heightened risk to individuals in immigration detention—even in facilities without any confirmed COVID-19 cases—and have ordered their release.³¹ Courts have similarly ordered release for many individuals held or incarcerated under the federal criminal system. *See* ECF 1 ¶ 144.

LEGAL STANDARD

Motions for temporary restraining orders and preliminary injunctions are governed by the same four-factor test: Courts consider whether plaintiffs have shown: (1) a likelihood of success

²⁹ Parisa Hafezi, *Iran Temporarily Frees 85,000 From Jail Including Political Prisoners*, Reuters (Mar. 17, 2020), available at <https://www.reuters.com/article/us-health-coronavirus-iran-prisoners/iran-temporarily-frees-85000-from-jail-including-political-prisoners-amid-coronavirus-idUSKBN21410M>.

³⁰ *See* Catherine Kim, *Why People Are Being Released From Jails and Prisons During the Pandemic*, Vox (Apr. 3, 2020), available at <https://www.vox.com/2020/4/3/21200832/jail-prison-early-release-coronavirus-covid-19-incarcerated> (“California announced that it would let out 3,500 nonviolent inmates in the next 60 days — the most drastic measure taken by states so far. New York City Mayor Bill de Blasio also announced the city had released 900 people as of March 31.”).

³¹ *See, e.g., Xochihua-James v. Barr*, No. 18-71460 (9th Cir. Mar. 23, 2020) (unpublished) (sua sponte releasing individual from immigration detention “in light of the rapidly escalating public health crisis”); *Hernandez v. Wolf*, 5:20-cv-00617-TJH-KS, Dkt. No. 17 (C.D. Cal. Apr. 1, 2020) (granting TRO releasing high-risk individuals in immigration detention due to the dangers of COVID-19); *Arriaga Reyes v. Decker*, 2:20-cv-03600, Dkt. No. 27 (D.N.J. Apr. 13, 2020) (same); *Hope v. Doll*, 1:20-cv-00562-JEJ, Dkt. No. 11 (M.D. Pa. Apr. 7, 2020); *Ortoño v. Jennings*, 3:20-cv-02064-MMC, Dkt. No. 38 (C.D. Cal. Apr. 8, 2020); *Castillo v. Barr*, 20-cv-00605-TJH, Dkt. No. 32 (C.D. Cal. Mar. 27, 2020) (same); *Coronel v. Decker*, 20-cv-2472-AJN, Dkt. No. 26 (S.D.N.Y. Mar. 27, 2020) (same); *Basank v. Decker*, 20-cv-2518-AT, Dkt. No. 11 (S.D.N.Y. Mar. 26, 2020) (same); *Frailhat v. Wolf*, 20-cv-00590-TJH-KSx (C.D. Cal. Mar. 31, 2020) (same); *Malam v. Adducci*, 2:20-cv-10829-JEL-APP, Dkt. No. 23 (E.D. Mich. Apr. 6, 2020) (same); *Thakker v. Doll*, 1:20-cv-00480-JEJ, Dkt. No. 47 (E.D. Pa. Mar. 31, 2020) (ordering releases from two facilities in Pennsylvania lacking confirmed cases); *see also Ronal Umana Jovel v. Decker*, 12-cv-308-GBD, Dkt. No. 27 (S.D.N.Y. Mar. 26, 2020) (ordering release under *Mapp v. Reno*, 241 F.3d 221 (2d Cir. 2001)); *Jimenez v. Wolf*, 18-10225-MLW (D. Mass. Mar. 26, 2020) (same).

on the merits; (2) that they are likely to suffer irreparable harm in the absence of such relief; (3) that the balance of equities tips in plaintiffs' favor; and (4) that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008); *see also Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 188-89 (4th Cir. 2013) (en banc) (outlining *Winter* standard). To show a likelihood of success on the merits, plaintiffs "need not show a certainty of success." *Pashby v. Delia*, 709 F.3d 307, 321 (4th Cir. 2013).

ARGUMENT

I. Plaintiffs Are Likely to Succeed on the Merits.

a. Plaintiffs' Continued Detention Constitutes Impermissible Punishment.

i. Plaintiffs, Who Are Civilly Detained Pending Adjudication of their Removal Proceedings, Are Afforded Heightened Due Process Protections.

Persons in immigration detention, even those with prior criminal convictions, are detained pursuant to civil immigration laws. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Their constitutional protections while in custody are thus derived from the Fifth Amendment, which provides protection greater than the Eighth Amendment. Persons who, like Plaintiffs, are held in civil detention are entitled to "more considerate treatment and conditions of confinement" than persons who are incarcerated because of a criminal conviction. *Heyer v. United States Bureau of Prisons*, 849 F.3d 202, 209 n.5 (4th Cir. 2017) (quoting *Youngberg v. Romeo*, 457 U.S. 307, 322 (1982)); *see Brown v. Harris*, 240 F.3d 383, 388 (4th Cir. 2001) ("[T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law." (quoting *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977))). Courts have consistently held that persons in immigration detention must be afforded *at least* the same conditions as those held in other forms of civil detention. *See e.g., Unknown Parties v. Johnson*, No. CV-15-00250-TUC-DCB, 2016 WL 8188563 (D. Ariz.

Nov. 18, 2016), *aff'd sub nom. Doe v. Kelly*, 878 F.3d 710 (9th Cir. 2017); *Charles v. Orange Cty.*, 925 F.3d 73 (2d Cir. 2019).³²

ii. Plaintiffs, Who Are Civilly Detained, May Not Be Punished.

As explained above, individuals in civil detention who challenge their confinement are protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. *See Youngberg v. Romeo*, 457 U.S. 307, 315 (1982). The Eighth Amendment, which applies to persons convicted of criminal offenses, allows punishment as long as it is not cruel and unusual, but the Fifth Amendment's due process protections do not allow punishment at all. *Bell v. Wolfish*, 441 U.S. 520, 536-37 n.16 (1979) (holding that persons in pretrial detention may be held in custody "so long as those conditions and restrictions [of confinement] do not amount to punishment"); *Nelson v. Collins*, 659 F.2d 420, 425 (4th Cir. 1981).

To establish that a particular condition or restriction of detention constitutes impermissible punishment under the Due Process Clause, a petitioner must show either (1) an expressed intent to punish; or (2) a lack of a reasonable relationship to a legitimate governmental purpose, from which an intent to punish may be inferred. *See Wolfish*, 441 U.S. at 538; *Martin v. Gentile*, 849 F.2d 863, 870 (4th Cir. 1988). Absent an explicit intention to punish, a court "must evaluate the evidence and ascertain the relationship between the actions taken against the detainee and the custodian's

³² Courts have disagreed on whether persons in civil detention are entitled to greater protections than individuals in criminal pre-trial detention. *Compare E.D. v. Sharkey*, 928 F.3d 299, 306-07 (3d Cir. 2019) (noting that the legal rights of those in immigration detention are analogous to those in pretrial detention), *with King v. Cty. of Los Angeles*, 885 F.3d 548, 552 (9th Cir. 2018) (finding unconstitutional treatment where conditions in civil detention are similar to pre-trial criminal detention). The Fourth Circuit has not yet addressed this issue. Because Plaintiffs are detained civilly while awaiting adjudication of their removal proceedings, they are entitled to a more lenient standard. *See Unknown Parties*, 2016 WL 8188563, at *5. Plaintiffs also, at a minimum, succeed under the pretrial detention standard recognized by the Fourth Circuit as sufficient to establish a due process violation. Thus, under either standard, Plaintiffs have established a likelihood of success on the merits of their due process claim.

supporting rationale.” *Williamson v. Stirling*, 912 F.3d 154, 178 (4th Cir. 2018). “That inquiry turns on whether the actions taken may validly be attributed to an alternative, nonpunitive rationale, and whether they appear ‘excessive in relation to the alternative purpose assigned.’” *Id.* (citations omitted).

iii. Plaintiffs’ Confinement Constitutes Punishment Because It Is Not Reasonably Related to a Legitimate Government Purpose.

Plaintiffs’ detention is clearly excessive of any legitimate interest Defendants have in their imprisonment. Although Defendants have an interest in preventing flight and protecting public safety, *see Zadvydas v. Davis*, 533 U.S. 678, 690 (2001), “unsanitary conditions, which include overcrowding and a high risk of COVID-19 transmission, are [not] rationally related to that legitimate government objective.” *Thakker v. Doll*, 1:20-cv-00480 (JEJ), Dkt No. 47, at 21 (E.D. Pa. Mar. 31, 2020). As set forth previously, each of the Plaintiffs suffers from underlying health conditions or old age that make them especially susceptible to severe illness or death if they contract COVID-19. The Virginia Detention Facilities are not equipped to take adequate measures that would prevent them from contracting COVID-19.

By holding Plaintiffs in conditions where they are unable to take the necessary precautions against infection, Defendants’ actions dramatically increase the likelihood that Plaintiffs will contract COVID-19. Detention ceases to be reasonably related to its objective when it also threatens imminent illness and death. In *Zadvydas*, the Supreme Court explained that this meant that “[t]here is no sufficiently strong special justification . . . for indefinite civil detention.” *Zadvydas*, 533 U.S. at 690. Similar principles apply here. If the government’s interest cannot justify indefinite detention, it also cannot justify the similarly “potentially permanent” medical harm and death that Plaintiffs could well face. *See id.* at 690-91.

Under these circumstances, the government's decision to keep Plaintiffs detained in conditions where they are extremely vulnerable to severe illness and death from COVID-19 is clearly excessive in relation to any interest they may have in Plaintiffs' continued detention.

b. Plaintiffs' Continued Detention Violates Their Constitutional Right to Reasonable Safety.

i. Defendants May Not Act with Deliberate Indifference to a Substantial Risk of Harm.

The government has an affirmative duty to provide conditions of reasonable health and safety to the people it holds in its custody regardless of whether that individual is held civilly or criminally. As the Supreme Court has made clear,

[W]hen 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 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

DeShaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189, 199-200 (1989). Therefore, an individual can establish a due process violation by demonstrating that the challenged conditions or conduct violate the Eighth Amendment's prohibition on cruel and unusual punishment. *See Youngberg*, 457 U.S. at 321-22.

In order to establish a violation of the Eighth Amendment, convicted persons must show "deliberate indifference" on the part of prison officials. *Farmer v. Brennan*, 511 U.S. 825, 828 (1994). The Fourth Circuit has held that a person in pretrial detention necessarily "makes out a due process violation if he shows 'deliberate indifference to serious medical needs' . . . because no legitimate nonpunitive goal is served by a denial or unreasonable delay in providing medical treatment where the need for such treatment is apparent." *Martin v. Gentile*, 849 F.2d 863, 871 (4th Cir. 1988) (citation omitted). In order to show that defendants acted with deliberate

indifference to a serious harm, a plaintiff must show that (1) the plaintiff was exposed to a substantial risk of serious harm, and (2) the defendants knew of or disregarded that substantial risk to the plaintiff's health or safety. *Farmer v. Brennan*, 511 U.S. 825, 834, 837–38 (1994); *Thompson v. Virginia*, 878 F.3d 89, 97-98 (4th Cir. 2017).

ii. Plaintiffs Are Exposed to a Substantial Risk of Serious Harm.

For the first prong, a plaintiff “must establish a serious deprivation of his rights in the form of a serious or significant physical or emotional injury” or *substantial risk* of injury. *Danser v. Stansberry*, 772 F.3d 340, 346-47 (4th Cir. 2014). Such a claim “may be based on a defendant’s conduct in exposing an inmate to an unreasonable risk of future harm.” *Smith v. Carpenter*, 316 F.3d 178, 188 (2d Cir. 2003). Therefore, conditions that pose an unreasonable risk of future harm violate the Eighth Amendment’s prohibition against cruel and unusual punishment, and thus *a fortiori* the Fifth Amendment’s prohibition against any form of punishment, even if that harm has not yet come to pass. In *Helling v. McKinney*, 509 U.S. 25 (1993), the Supreme Court held that correctional officials may not ignore conditions that are “very likely to cause serious illness and needless suffering” in the future, and that such prospective harm may form the basis of an Eighth Amendment claim, even where the prisoner has “no serious current symptoms.” *Id.* at 33. The Court in *Helling* specifically recognized that the risk of contracting a communicable disease could constitute such an “unsafe, life-threatening condition.” *Id.* at 33; *see also id.* at 34 (citing with approval *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974), which held that prisoners were entitled to relief under the Eighth Amendment when they showed, inter alia, “the mingling of inmates with serious contagious diseases with other prison inmates”).

In this case, Plaintiffs face a substantial risk of severe illness or death from an outbreak of COVID-19 in the Virginia Detention Facilities. First, COVID-19 is unlike any other contagious or communicable disease to which detained persons may be exposed in that it is spreading at alarming

rates and there is no vaccine.³³ Ex. 12, Greifinger Dec. ¶¶ 4-5. Second, Plaintiffs, due to their age or underlying medical conditions, are especially vulnerable to serious illness or death if they contract COVID-19. *Id.* at ¶ 28. Third, based on COVID-19 outbreaks in other countries and in other detention centers in the United States, it is only a matter of time until the disease spreads into detention facilities that are not yet aware of an outbreak in their facilities.³⁴ *Id.* at ¶ 10. In fact, COVID-19 has already begun to spread rapidly in prisons, jails, and detention centers in the United States.³⁵ Fourth, there are currently individuals in both facilities who are showing symptoms of COVID-19 but have not been tested. Ex. 2, ElGammal Dec. ¶¶ 5-6, 14; Ex. 3, Kumaragame Dec. ¶ 5; Ex. 7, Julien Dec. ¶ 5; Ex. 9, Wardlaw Dec. ¶ 15. Finally, ICE's response to COVID-19 has been inadequate. Ex. 12, Greifinger Dec. ¶ 17. ICE is not conducting the screening and testing of detained individuals, staff, officials, contractors, vendors and other care and service providers that is needed to contain an outbreak. *Id.* at ¶¶ 21-22. Given the general lack of available testing, it would be impossible for detention facilities to consistently screen and test everyone for new, asymptomatic infection. Even if testing was available, it would not be sufficient to control the outbreak due to the high rates of false negative test results and the multi-day delay in getting test results. ICE's plan to segregate individuals who meet the CDC's criteria for epidemiologic risk of

³³ Letter from Dr. Scott Allen and Dr. Josiah Rich, Medical Experts for DHS, to House Comm. on Homeland Sec. (Mar. 19, 2020), *available at* <https://www.documentcloud.org/documents/6816336-032020-Letter-From-Drs-Allen-Rich-to-Congress-Re.html#document/p4/a557238>.

³⁴ See Hannah Summers, *'Everyone Will Be Contaminated': Prisons Face Strict Coronavirus Controls*, The Guardian (Mar. 23, 2020), *available at* <https://www.theguardian.com/global-development/2020/mar/23/everyone-will-be-contaminated-prisons-face-strict-coronavirus-controls>.

³⁵ See O'Brien, *supra* note 16; Bryant, *supra* note 16; LaRose, *supra* note 16.

exposure to COVID-19 is inadequate to contain an outbreak. *Id.* at ¶ 25. There are not enough necessary negative pressure isolation rooms in the Virginia Detention Facilities, which are the only way to control the spread of COVID-19 through air pathways. *Id.* at ¶ 26. As the Northern District of California has recognized, “screening people based on observable symptoms is just a game of catch up” because some COVID-19 carriers can be asymptomatic or not show symptoms for weeks after exposure. *In re. Extradition of Alejandro Toledo-Manrique*, No. 19-mj-71055, 2020 WL 1307109 (N.D. Cal. March 19, 2020) (ordering release on bond in part because government’s COVID-19 management plan did not “say anything about testing” for COVID-19). In fact, ICE’s preparedness plan for contagious diseases was determined to be insufficient in 2019 by DHS’s own Inspector General,³⁶ and Farmville Detention Center has recently experienced an outbreak of mumps, which – unlike COVID-19 – has a readily accessible vaccine.³⁷

By the time ICE recognizes that there is a coronavirus outbreak in the detention facilities in which Plaintiffs are held, it will be too late for Plaintiffs. Therefore, Plaintiffs are exposed to a substantial risk of serious harm while detained in the Virginia Detention Facilities.

iii. Defendants Have Disregarded a Substantial Risk of Serious Harm to Plaintiffs.

The second prong of the Eighth Amendment standard requires the plaintiff to establish that the prison or detention official involved had “a sufficiently culpable state of mind” amounting to “deliberate indifference to inmate health or safety.” *Farmer*, 511 U.S. at 834. Evidence

³⁶ See Office of Inspector General, *ICE Does Not Fully Use Contracting Tools to Hold Detention Facility Contractors Accountable for Failing to Meet Performance Standards*, 1 (Jan. 29, 2019), available at <https://www.oig.dhs.gov/sites/default/files/assets/2019-02/OIG-19-18-Jan19.pdf>.

³⁷ Emma Ockerman, *Migrant Detention Centers Are Getting Slammed with Mumps and Chickenpox*, Vice News (Jun. 14, 2019), available at https://www.vice.com/en_us/article/mb8k5q/migrant-detention-centers-are-getting-slammed-with-mumps-and-chicken-pox.

establishing a culpable state of mind requires actual knowledge of an excessive risk to the detained person's safety, or evidence that detention officials were aware of facts from which an inference could be drawn that a substantial risk of serious harm exists and that the inference was drawn. *Id.* at 837. A plaintiff may "prove an official's actual knowledge of a substantial risk 'in the usual ways, including inference from circumstantial evidence'" so that "'a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.'" *Raynor v. Pugh*, 817 F.3d 123, 128 (4th Cir. 2016).

It is clear that ICE has actual knowledge of the excessive risk that the coronavirus presents to the safety of those in ICE custody. ICE has created policy guidance outlining its response to the virus.³⁸ The agency has also announced it will delay enforcement actions to arrest fewer immigrants and use alternatives to detention as a response to the COVID-19 outbreak.³⁹ As early as February 25, 2020, Dr. Scott Allen and Dr. Josiah Rich, medical experts to the Department of Homeland Security, shared concerns about the specific risk to those in immigration detention as a result of COVID-19 with the agency. These experts warned of the danger of rapid spread of COVID-19 in immigration detention facilities and recommended release of most people held in ICE custody.⁴⁰ Over the last month, ICE has received numerous letters from advocates, medical

³⁸ U.S. Immigration and Customs Enforcement, ICE Guidance on COVID-19 (accessed Apr. 9, 2020), <https://www.ice.gov/coronavirus>; COVID-19 Detained Docket Review from Peter B. Berg, Assistant Director, Field Operations to ICE Field Office Directors and Deputy Field Office Directors (Apr. 4, 2020), *available at* <https://www.yumpu.com/en/document/read/63213517/ecf-14-1-decl>.

³⁹ See Maria Sacchetti and Arelis R. Hernández, *ICE to Stop Most Immigration Enforcement Inside the U.S., Will Focus on Criminals During Coronavirus Outbreak*, The Washington Post (Mar. 18, 2020), *available at* https://www.washingtonpost.com/national/ice-halting-most-immigration-enforcement/2020/03/18/d0516228-696c-11ea-abef-020f086a3fab_story.html.

⁴⁰ See, e.g., Letter from Dr. Scott Allen and Dr. Josiah Rich, Medical Experts for DHS, to House Comm. on Homeland Sec. (Mar. 19, 2020), *available at*

professionals, and Members of Congress emphasizing the increased risk faced by vulnerable populations in ICE detention facilities.⁴¹

There have also been many news articles highlighting the risk of coronavirus outbreaks in ICE facilities.⁴² The federal government itself has issued warnings about the particular risk of COVID-19 for those who are elderly or who have certain medical conditions, including those from which Plaintiffs suffer.⁴³ Despite the fact that ICE is aware of the substantial risk faced by Plaintiffs, all of whom have underlying medical conditions that increase their risk of serious illness or death if they contract COVID-19, ICE continues to detain Plaintiffs in conditions where there is a heightened public health risk for the spread of the virus. The measures ICE has implemented thus far are clearly inadequate; Plaintiffs have reported that they have received little to no useful

<https://www.documentcloud.org/documents/6816336-032020-Letter-From-Drs-Allen-Rich-to-Congress-Re.html#document/p4/a557238>.

⁴¹ Letter from 763 non-governmental organizations to Matthew T. Albence, Acting Director of ICE (Mar. 19, 2020), *available at* <https://www.detentionwatchnetwork.org/sites/default/files/ICE%20Response%20to%20Coronavirus%20for%20People%20Detained%20-%20Organizational%20Sign%20on%20Letter%20-%20Final.pdf>; Catherine E. Shoichet, *Doctors Warn of 'Tinderbox Scenario' if Coronavirus Spreads in ICE Detention*, CNN (Mar. 20, 2020), *available at* <https://www.cnn.com/2020/03/20/health/doctors-ice-detention-coronavirus/index.html>; Letter from Rep. Carolyn Maloney and Rep. Jamie Raskin to Acting Secretary of DHS Chad Wolf (Mar. 11, 2020), *available at* <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2020-03-11.CBM%20and%20JR%20to%20Wolf-DHS%20re%20COVID-19.pdf>

⁴² *See, e.g.*, Abigail Hauslohner, Nick Miroff & Matt Zapotosky, *Coronavirus Could Pose Serious Concern in ICE Jails, Immigration Courts*, The Washington Post (Mar. 12, 2020), *available at* https://www.washingtonpost.com/immigration/coronavirus-immigration-jails/2020/03/12/44b5e56a-646a-11ea-845d-e35b0234b136_story.html.

⁴³ *Are You at Higher Risk for Severe Illness?*, Centers for Disease Control and Prevention (accessed Apr. 9, 2020), *available at* <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html>.

guidance about COVID-19 and they continue to live and interact in close quarters despite the risk of infection. Ex. 6, Chacon Dec. ¶ 7; Ex. 8, Schmelzel Dec. ¶ 5; Ex. 9, Wardlaw Dec. ¶ 7; Ex. 10, Aguilon Dec. ¶ 9; Ex. 11, Warmeling Dec. ¶ 15.

Thus, as the Court recognized in *Helling*, the Constitution “require[s] a remedy” that ensures protection of Plaintiffs’ safety. *Helling*, 509 U.S. at 33.

c. The Court Has Authority to Order Plaintiffs’ Release as the Sole Effective Remedy for the Constitutional Violation.

This Court has authority to release Plaintiffs in two forms: a writ of habeas corpus or an order granting injunctive relief. Habeas corpus is available if a person is “in custody in violation of the Constitution or laws or treaties of the United States” 28 U.S.C. § 2241(c)(3). Plaintiffs here meet the two jurisdictional requirements: They are in custody and they claim their continued confinement violates the Constitution. “Habeas is at its core a remedy for unlawful executive detention.” *Munaf v. Geren*, 553 U.S. 674, 693 (2008). Plaintiffs claim that their continued confinement is unconstitutional and that they are entitled to immediate release: a claim that lies “within the core of habeas corpus.” *Preiser v. Rodriguez*, 411 U.S. 475, 487 (1973). The District of Maryland has also recently noted that a claim by persons in immigration detention “seeking release because of unconstitutional conditions or treatment is cognizable under § 2241.” *Coreas v. Bounds*, No. 8:20-cv-00780-TDC, Dkt. No. 56 (D. Md. Apr. 3, 2020). Indeed, courts all over the country have invoked their authority under habeas to order the immediate release of individuals in immigration detention centers. *See e.g., Malam v. Adducci*, 2:20-cv-10829-JEL-APP, Dkt. No. 23 (E.D. Mich. Apr. 6, 2020) (holding that “where a petitioner claims no set of conditions would be sufficient to protect her constitutional rights, her claim should be construed as challenging the fact, not conditions, of her confinement and is therefore cognizable in habeas.”); *Hernandez v. Wolf*, 5:20-cv-00617 (TJH) (KS), Dkt. No. 17 (C.D. Cal. Apr. 1, 2020) (noting that habeas relief is not

barred in case of detained immigrant seeking release due to threat from COVID-19 because INA “does not restrict *habeas* jurisdiction for petitions that raise constitutional claims).

In this case, Plaintiffs seek release from detention. Release is the only effective remedy for the constitutional violation they face. Preventive measures, such as social distancing, may be effective in the community, but are impossible to implement in the detention setting, especially so in the Virginia Detention Facilities. Ex. 12, Greifinger Dec. ¶¶ 11, 16, 18, 20. Plaintiffs continue to live and undertake activities with other people held in close quarters, and are unable to maintain the necessary hygiene and social distancing measures that could protect them from the disease. Therefore, Plaintiffs have a cognizable claim under 28 U.S.C. § 2241.

Regardless of whether habeas is the appropriate vehicle, Plaintiffs have also filed the instant case as a civil action, and this Court can and should order release as a form of injunctive relief. Courts clearly have authority to order release to redress unconstitutional conditions of confinement. “A district court enjoys wide discretionary authority in formulating remedies for constitutional violations.” *Smith v. Bounds*, 813 F.2d 1299, 1301 (4th Cir. 1987). Moreover, “[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).

This principle is well-established. For example, in cases involving prisons and jails, federal courts have repeatedly ordered the release of detained persons when necessary to remedy constitutional violations caused by overcrowding. *See, e.g., Duran v. Elrod*, 713 F.2d 292, 297-98 (7th Cir. 1983), *cert. denied*, 465 U.S. 1108 (1984) (concluding that court did not exceed its authority in directing release of individuals on low-bond pretrial detention as necessary to reach a population cap); *Mobile Cty. Jail Inmates v. Purvis*, 581 F. Supp. 222, 224-25 (S.D. Ala. 1984) (concluding that district court properly exercised remedial powers to order a prison’s population

reduced to alleviate unconstitutional conditions and noting other cases); *Inmates of the Allegheny Cty. Jail v. Wecht*, 565 F. Supp. 1278, 1297 (W.D. Pa. 1983) (order to reduce overcrowding “is within our power to correct the constitutional violations”); *Brenneman v. Madigan*, 343 F. Supp. 128, 139 (N.D. Cal. 1972) (“If the state cannot obtain the resources to detain persons . . . in accordance with minimum constitutional standards, then the state simply will not be permitted to detain such persons.”).

For the foregoing reasons, Plaintiffs are likely to succeed on the merits of their claim that their continued detention violates their Fifth Amendment due process right to reasonable safety in government custody.

II. The Remaining Factors Weigh Heavily in Favor of Granting a Temporary Restraining Order and/or Preliminary Injunction.

a. Plaintiffs Will Suffer Irreparable Harm Absent Preliminary Relief.

The Fourth Circuit has held that “the denial of a constitutional right” itself “constitutes irreparable harm for purposes of equitable jurisdiction.” *Ross v. Meese*, 818 F.2d 1132, 1135 (4th Cir. 1987). Accordingly, Plaintiffs – whose Fifth Amendment rights are being violated – are suffering irreparable harm.

Plaintiffs are also suffering irreparable harm because they have underlying medical conditions that increase their likelihood of severe illness or death if they contract COVID-19. Public health experts have concluded that people with these characteristics in institutional settings such as immigration detention centers are at grave risk of severe illness and death. Ex. 12, Greifinger Dec. ¶¶ 10-16. Accordingly, more than 3,000 medical health professionals have urgently requested that ICE immediately release detained immigrants in their custody, and two doctors who are medical experts for the Department of Homeland Security have sent a warning to

Congress that keeping people in immigration detention poses “an imminent risk to the health and safety of immigration detainees” and to the general public.⁴⁴

Moreover, the harm is “neither remote nor speculative, but actual and imminent.” *Direx Israel, Ltd. v. Breakthrough Medical Group*, 952 F.2d 802, 812 (4th Cir. 1991) (citation omitted). The Eastern District of Pennsylvania emphasized the imminent nature of the threat in ordering immediate release for a group of individuals held in ICE detention facilities:

The Petitioners’ claim is rooted in imminent, irreparable harm. Petitioners face the inexorable progression of a global pandemic creeping across our nation—a pandemic to which they are particularly vulnerable due to age and underlying medical conditions. At this point, it is not a matter of if COVID-19 will enter Pennsylvania prisons, but when it is finally detected therein.

Thakker v. Doll, 1:20-cv-00480 (JEJ), Dkt No. 47 (E.D. Pa. Mar. 31, 2020). Once ICE confirms that COVID-19 has reached the Virginia Detention Facilities, it “may be too late,” *Toledo-Manrique*, 2020 WL 1307109, at *1, especially considering the lack of available testing. Furthermore, the Virginia Detention Facilities have patently failed to provide conditions of basic health and safety, making it all the more likely that the harm is imminent.

b. The Public Interest and Balance of Equities Weigh Heavily in Plaintiffs’ Favor.

The final two factors generally “merge when the Government is the opposing party.” *Nken v. Holder*, 556 U.S. 418, 435 (2009); see *Kravitz v. U.S. Dep’t of Commerce*, 366 F. Supp. 3d 681, 755 (D. Md. 2019). The balance of harms and public interest weigh strongly in favor of granting preliminary relief. See *Winter*, 555 U.S. at 24. In contrast to the irreparable injury facing plaintiffs, the government will not be injured by an injunction. As the Fourth Circuit has recognized, a

⁴⁴ Catherine E. Shoichet, *Doctors Warn of 'Tinderbox Scenario' if Coronavirus Spreads in ICE Detention*, CNN (Mar. 20, 2020), available at <https://www.cnn.com/2020/03/20/health/doctors-ice-detention-coronavirus/index.html>.

governmental entity “is in no way harmed by issuance of a preliminary injunction which prevents it from enforcing a regulation, which . . . is likely to be found unconstitutional. . . . Surely, upholding constitutional rights serves the public interest.” *Newsom ex rel. Newsom v. Albemarle Cty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003); *Legend Night Club v. Miller*, 637 F.3d 291, 302-03 (4th Cir. 2011) (“[T]he State . . . is in no way harmed by issuance of an injunction that prevents the state from enforcing [unlawful] restrictions.”). Because Plaintiffs’ continued detention is unconstitutional and unlawful, both the balance of the equities and the public interest weigh in favor of emergency relief.

III. The Court Should Not Require Plaintiffs to Provide Security Prior to Issuing a Temporary Restraining Order and/or Preliminary Injunction.

Federal Rule of Civil Procedure 65(c) provides that “The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.” However, “the district court retains the discretion to . . . waive the security requirement.” *Pashby v. Delia*, 709 F.3d 307, 332 (4th Cir. 2013) (citation omitted). District courts routinely exercise this discretion to require no security in cases brought by indigent and/or incarcerated people. *See, e.g., Beck v. Hurwitz*, 380 F. Supp. 3d 479, 485 (M.D. N.C. 2019) (federal prisoner); *Toussaint v. Rushen*, 553 F. Supp. 1365, 1383 (N.D. Cal. 1983) (state prisoners); *Orantes–Hernandez v. Smith*, 541 F. Supp. 351, 385 n. 42 (C.D. Cal. 1982) (detained immigrants). This Court should do the same here.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant the motion for a temporary restraining order and/or preliminary injunction and order their immediate release from custody.

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Respectfully submitted,

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