IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

DADA, *et al*., *Petitioners-Plaintiffs*, v. WITTE, *et al.,* *Respondents-Defendants*.	Civil Action No.: 2:20-cv-01093 Section T(4) Judge Greg G. Guidry Magistrate Judge Karen Wells Roby **ORAL ARGUMENT REQUESTED**

PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO
MOTION FOR TEMPORARY RESTRAINING ORDER

I. THE OVERWHELMING RECORD EVIDENCE REVEALS THAT DEFENDANTS CANNOT THEMSELVES MITIGATE THE RISK OF COVID-19 SPREAD, PLACING PLAINTIFFS IN IMMINENT DANGER OF SERIOUS ILLNESS AND DEATH.

A. The Escalating Crisis

In the three days since this case was filed, the situation has rapidly deteriorated in the states where Plaintiffs are detained. Confirmed COVID-19 cases in Louisiana increased from 5,237 to 12,496;[1] in Alabama, from 1,000 to 1,550;[2] and in Mississippi, from 1,073 to 1,455.[3] COVID-19 has now killed five people at Oakdale Federal Correctional Institution, a federal prison within a two-hour drive from seven ICE detention facilities, including LaSalle ICE Processing Center and Winn Correctional Center.[4] On March 31, 2020, just three days after the first death there, Oakdale stated that it was no longer testing persons at the facility and would instead presume COVID-19 infection because of the extent of transmission within the facility.[5] Other state facilities across Louisiana are now reporting the spread of COVID-19 within their walls.[6] Alabama has had confirmed cases in at least four of its jails.[7] And Mississippi reports an outbreak in a longterm care

---

[1] *Coronavirus (COVID-19)*, Louisiana Department of Health, accessed Apr. 4, 2020, available at: http://ldh.la.gov/coronavirus/

[2] *Alabama's COVID-19 Data and Surveillance Dashboard*, Alabama Department of Public Health, accessed April 4, 2020, available at: https://alpublichealth.maps.arcgis.com/apps/opsdashboard/index.html#/6d2771faa9da4a2786a509d82c8cf0f7

[3] Coronavirus Disease 2019, Mississippi State Department of Health, accessed, Apr. 4, 2020, available atL https://msdh.ms.gov/msdhsite/_static/14,0,420.html#caseTable

[4] , Caroline Habetz *Fifth inmate at Oakdale federal prison dies from COVID-19*, KPLC TV, April 3, 2020, available at https://www.kplctv.com/2020/04/03/fifth-inmate-oakdale-federal-prison-dies-covid-/

[5] Nicholas Chrastil, *Louisiana federal prison no longer testing symptomatic inmates for coronavirus due to 'sustained transmission',* The Lens, March 31, 2020, available at https://thelensnola.org/2020/03/31/louisiana-federal-prison-no-longer-testing-symptomatic-inmates-for-coronavirus-due-to-sustained-transmission/

[6] *2 EBR inmates test positive for COVID-19; wing of prison quarantined*, WAFB9, Mar. 30, 2020, available at https://www.wafb.com/2020/03/31/ebr-inmate-tests-positive-covid-after-reported-drug-overdose-wing-prison-quarantined/; *Coronavirus behind bars in Louisiana: As 2 die in federal custody, 11 state inmates test positive*, WDSU News, Apr. 1, 2020, available at https://www.wdsu.com/article/coronavirus-behind-bars-in-louisiana-as-2-die-in-federal-custody-11-state-inmates-test-positive/32011451#; *Louisiana Office of Juvenile Justice reports almost a dozen positive COVID-19 cases*, KALB, Mar. 31, 2020, available at https://www.kalb.com/content/news/Office-of-Juvenile-Justice-reports-almost-a-dozen-positive-COVID-19-cases--569254961.html

[7] *MCSO: Corrections officer, inmate tests positive for COVID-19*, FOX10, Mar. 31, 2020, available atL https://www.fox10tv.com/news/coronavirus/mcso-corrections-officer-inmate-tests-positive-for-covid-19/article_d6dca764-7368-11ea-af94-a71eb864f88a.html; *DOC inmates at two facilities now making masks for staff and inmates*, WSFA News, Apr. 1, 2020, available at: https://www.wsfa.com/2020/04/02/adoc-staton-correctional-

facility in Adams County.[8] To fight the spread of COVID-19, Alabama governor Kay Ivey has facilitated the reduction of that state's jail population.[9] On April 3, 2020, Louisiana Supreme Court Chief Justice Bernette J. Johnson called for judges to reduce the jail population because "[a]n outbreak of COVID-19 in our jails would be potentially catastrophic for jail staff, the families of jail staff, and inmates."[10] ICE, whose poor health provision record Defendants do not dispute, *see* ECF No 2-1 at 8; ECF No 1 at 137, would not fare any better than these prison facilities.

Defendants' claim that there are no confirmed cases of COVID-19 in the five detention facilities rings hollow given the extent of asymptomatic transmission and the absence of the widespread testing needed to contain an outbreak of this magnitude. *See, e.g.,* ECF No. 2-21 ¶13. Defendants do not dispute that it is impossible for detention facilities to consistently screen and test for new, asymptomatic infection given the lack of availability of COVID-19 testing. *See* ECF 7-1. Without rigorous and widespread testing, there is simply no way of knowing how many COVID-19 cases there really are in the Louisiana, Mississippi, and Alabama detention facilities.

ICE is alone in minimizing the risk of harm, even as it escalates it. In fact, ICE has now confirmed that an individual detained at the Pine Prairie ICE Processing Center has tested positive for COVID-19.[11] ICE knows this because ICE took custody of him *knowing* that he had already

---

staff-member-has-coronavirus/; *Employee at federal prison in Talladega tests positive for coronavirus*, WSFA News, Apr. 2, 2020, available at: https://www.wsfa.com/2020/04/02/employee-federal-prison-talladega-tests-positive-coronavirus/

[8] *Alabama's COVID-19 Data and Surveillance Dashboard*, Alabama Department of Public Health, accessed April 4, 2020, available at: https://alpublichealth.maps.arcgis.com/apps/opsdashboard/index.html#/6d2771faa9da4a2786a509d82c8cf0f7

[9] *Coronavirus: Order from Gov. Kay Ivey could ease inmate backlog in county jails*, Montgomery Advertiser, Apr. 2, 2020, available at: https://www.montgomeryadvertiser.com/story/news/2020/04/02/coronavirus-order-gov-kay-ivey-could-ease-inmate-backlog-county-jails/5116972002/

[10] Letter from Louisiana Supreme Court Chief Justice Bernette J. Johnson to Louisiana District Judges, Apr. 2, 2020, available at: https://www.lasc.org/COVID19/2020-04-02-LASC-ChiefLetterReCOVID-19andjailpopulation.pdf

[11] *ICE Guidance on COVID-19*, U.S. Immigration and Customs Enforcement, accessed Apr. 4, 2020, available at: https://www.ice.gov/coronavirus; *ICE detainee tests positive for COVID-19 in Pine Prairie, Louisiana*, The Daily Advertiser, Apr. 3, 2020, available at : https://www.theadvertiser.com/story/news/american-south/2020/04/03/coronavirus-ice-detainee-tests-positive-pine-prairie-louisiana/2946110001/

tested positive at Oakdale FCI, and deliberately transferred him to Pine Prairie, putting the rest of the population at risk.[12] ICE introduced COVID-19 into Pine Prairie, and has not stopped transferring individuals between facilities.[13] Such transfers mean that any quarantine is incomplete. They are also contrary to current CDC guidance, which calls on facilities to restrict transfers.[14] Even if, as ICE states, the infected individual is in isolation, the lack of negative pressure isolation rooms means that any isolation is ineffective. *See* ECF 2-22 ¶10; ECF 2-21 ¶15.

B. Overwhelming Evidence Proves ICE Is Ill-Equipped to Control The Disease

The central facts of this case remain unchallenged and undisputed. There is no dispute that Plaintiffs in this case are at risk for severe injury or even death if they contract COVID-19. ECF No. 1 ¶¶22-38; Meyer Supp. Decl. ¶12(f). There is no dispute that it is impossible for Plaintiffs to maintain the vigilant hygiene and social distancing necessary to keep themselves safe from infection. Meyer Suppl. Decl. ¶12. There is no dispute that the facilities in which Plaintiffs are detained are crowded, making social distancing impossible: many sleep in dorms that they share with over 50 other individuals, in beds—sometimes double- or triple-bunk beds—that are well under six feet apart, in some cases less than two feet apart.[15] There is no dispute that bathrooms and dining halls are shared, and that, in one case, forty-four men share one shower. Asgari Decl., ¶18, ECF No. 2-4. While Defendants assert that these facilities are not at full capacity, Nelson Decl. ¶¶6, 9, 12, 15, 18, ECF. No. 7-1, this does not mean the facilities can implement the needed precautionary measures. *See* Meyer Supp. Decl. ¶ 12(a).

---

[12] *Id.*
[13] ECF No. 2-4 ¶¶ 13, 17; ECF No. 2-17 ¶ 7; ECF No. 2-8 ¶ 9; ECF No. 2-18 ¶ 18.
[14] Center for Disease Control and Prevention, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities,* March 23, 2020, available at https://www.cdc.gov/coronavirus/2019- ncov/community/correction-detention/guidance-correctional-detention.html.
[15] Katharina Obser Decl. ¶¶13-15; ECF No. 2-7 ¶¶15-16; ECF No. 2-11 ¶¶5, 7; ECF No. 2-15 ¶9; ECF No. 2-16 ¶¶8-9; ECF No. 2-6 ¶¶4-5; ECF No. 2-9 ¶8; ECF No. 2-8 ¶¶5, 8; ECF No. 2-14 ¶¶5, 7; ECF No. 2-18 ¶¶17-18; ECF No. 2-10 ¶¶5,7; ECF No. 2-5 ¶¶10-11; ECF No. 2-19 ¶7; ECF No. 2-4 ¶¶14,18; ECF No. 2-17 ¶¶5-6.

Moreover, the policies Defendants have described are outdated, ineffective, and are not being applied at the five detention centers. Meyer Supp. Decl. ¶¶11-12; *see* ECF No. 7-1. Apart from the current numbers of detained individuals, Defendants' declarant offers absolutely no facts specific to any of these facilities, and nowhere does he dispute that these policies are not being implemented at the five facilities. *See generally* ECF No. 7-1. Even if those policies were being implemented at the facilities, they are severely ineffective and outdated. The policies Defendants describe are based on CDC guidance dated March 11, 2020, but the CDC has since updated its guidance. On March 23, 2020—almost two weeks before Mr. Nelson executed his declaration—the CDC issued specific guidelines for detention centers, but ICE has not integrated that new guidance into their policies. Two weeks later, it is still "reviewing" the new guidance. ECF 7-1 ¶.

Not only are the general policies that Mr. Nelson describes outdated, they are entirely inadequate. As Dr. Meyer, a medical doctor and expert epidemiologist, explains:

> The updated [CDC] guidance does not separate individuals into risk categories but instead provides clear recommendations on how to implement evidence-based infection prevention and control strategies in detention settings. These recommendations are extremely detailed, whereas the policies cited in Mr. Nelson's declaration are vague and, per the plaintiffs' declarations, being inconsistently implemented. As a result, detainees in these facilities remain at high risk of COVID-19 exposure and infection.

Supp. Meyer Decl. ¶11. Dr. Meyer goes on to conclude that "it is my professional judgment that individuals placed in one of these 5 facilities are at a significantly higher risk of infection with COVID-19 as compared to the population in the community and that they are at a significantly higher risk of harm if they do become infected. These harms include serious illness (pneumonia and sepsis) and even death." *Id.* ¶13. Dr. Meyer accordingly recommends that "individuals who can safely and appropriately remain in the community not be placed in one of these 5 facilities at this time." *Id.* ¶14, Similarly, Dr. Bazzano concluded that Defendants' COVID-19 policy "will not

be sufficient to protect Plaintiffs, that few emergency resources existed to provide care when they fell ill, and that Plaintiffs were at high risk for multiorgan failure and death." ECF 2-21 ¶¶15, 18. Defendants provide no contrary evidence other than the blanket assertions of an ICE official with no medical training. In fact, Defendants' plan is based on a 2014 pandemic readiness plan long-ago criticized as inadequate by DHS's own Office of the Inspector General.[16]

Defendants claim that they will transfer Plaintiffs to regional hospitals if they become ill, but the explosion of COVID-19 combined with already under-resourced rural medical systems have led to severe shortages of intensive care unit beds and ventilators in the very hospitals expected to provide life-saving care when, inevitably, Plaintiffs fall ill.[17] Instead of protecting Plaintiffs, guards, and the surrounding community, ICE's "plan" puts them at grave risk of contracting COVID-19.

Moreover, Defendants fail to even follow their own inadequate policies at the five detention centers. Nowhere do Defendants explain or rebut Plaintiffs' observations that the staff at these detention centers do not wear masks or gloves,[18] or that Plaintiffs do not have adequate access to soap or hand sanitizer.[19] Defendants do not deny Plaintiffs' observations that individuals who are ill, including those presenting symptoms consistent with COVID-19, are not tested or given adequate medical care.[20] These practices run counter to current CDC guidance for detention

[16] Justin Rohrlich, *US immigration authorities were unprepared to contain a cross-border pandemic,* Quartz, March 18, 2020, available at https://qz.com/1820007/us-border-agencies-were-unprepared-to-contain-coronavirus/

[17] *As pandemic rages, U.S. immigrants detained in areas with few hospitals,* Reuters, Apr. 3, 2020, available at: https://www.reuters.com/article/us-health-coronavirus-usa-detention-insi/as-pandemic-rages-us-immigrants-detained-in-areas-with-few-hospitals-idUSKBN21L1E4.

[18] ECF No. 2-7 ¶¶15-16; ECF No. 2-11¶ 5; ECF No. 2-15 ¶9; ECF No. 2-16 ¶8; ECF No. 2-6 ¶5; ECF No. 2-8 ¶5; ECF No. 2-14 ¶5; ECF No. 2-18 ¶17; ECF No. 2-10 ¶7; ECF No. 2-5 ¶11; ECF No. 2-13 ¶8; ECF No. 2-4 ¶14; ECF No. 2-17 ¶5.

[19] ECF No. 2-17 ¶5; ECF No. 2-11 ¶5; ECF No. 2-14 ¶9; ECF No. 2-7 ¶16; ECF. No. 2-4 ¶19.

[20] ECF. No. 2-25 ¶4; ECF No. 2-27 ¶6,8,9; ECF No. 2-11 ¶ 5; ECF No. 2-17 ¶ 7; ECF No. 2-15 ¶ 7; ECF No. 2-8 ¶ 9; ECF No. 2-14 ¶ 4; ECF No. 2-14 ¶ 10; ECF No. 2-7 ¶ 15.

facilities, which, for example, recommended that facilities reassign bunks to provide six feet of space between individuals and limit group activity.[21]

While Defendants claim to be reviewing individuals on a case-by-case basis for release, Defendants nowhere explain what the timeline for such review is, whether Plaintiffs' cases have been reviewed, and, if they have, why they are still in custody. Further, the criteria Defendants are using to conduct such reviews are not consistent with CDC guidelines. Dr. Meyer notes that they are "incomplete" and fail to include CDC-recognized "high-risk conditions [that] include age >65, chronic lung disease (including asthma), chronic liver disease, chronic kidney disease, suppressed immune system, pregnancy, diabetes, and cardiovascular disease (including hypertension and heart disease)." Meyer Supp. Decl. ¶12(f). She therefore concludes that "[t]here is thus a high likelihood that many other high-risk individuals remain in ICE detention." *Id.*

Further, Defendants nowhere address how ICE will be able to dramatically expand medical facilities and staffing to conduct the necessary daily monitoring of guards, staff, officials, contractors, vendors, other care and service providers, and newly detained individuals. Given asymptomatic transmission, to effectively screen staff, the facilities would have to conduct frequent tests, taken multiple times a day as staff and the newly detained enter the facility. *See* ECF No. 2-21 ¶13. Defendants do not claim to be implementing such testing, nor could they, given the widespread shortage of testing kits. *See* ECF 7-1.

II. THIS COURT HAS JURISDICTION OVER PLAINTIFFS' HABEAS CLAIMS AND AUTHORITY TO ORDER RELEASE.

A. The ICE Field Office Director Who Has Custody Over Petitioners Is the Proper Respondent and this Court has Jurisdiction.

[21] Center for Disease Control and Prevention, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities,* March 23, 2020, available at https://www.cdc.gov/coronavirus/2019- ncov/community/correction-detention/guidance-correctional-detention.html.

In *Rumsfeld v. Padilla*, 542 U.S. 426, 435 (2004), the Supreme Court articulated the "immediate custodian rule" establishing that "the proper respondent is the warden of the facility where the prisoner is being held," rather than "the Attorney General or some other remote supervisory official." Contrary to Defendants' assertions, *Padilla*'s "immediate custodian rule," was not absolute, but instead a "default rule," which necessarily has exceptions, *id*. at 435-36, and the Court expressly "decline[d] to resolve" whether this rule should apply in immigration detention. *Id.* at 435 n. 8. In any case, Plaintiffs have not sued any "remote supervisory official," so the question before this court is not whether the default rule applies, but rather whether the proper respondent is the person who has the authority to release, transfer, and control each Plaintiff, that is, the ICE Field Office Director rather than the warden of each facility.

The Fifth Circuit has not addressed the specific question presented here, whether the default rule applies in immigration-related detention where the Plaintiffs are housed at facilities contracted by ICE. But district courts within the Fifth Circuit have not only found the "proper respondent" in habeas petitions brought by those detained by ICE to be the ICE Field Office Director, but also have declined to dismiss even high-level supervisors such as Secretary of Homeland Security, the Attorney General, and the Director of ICE. *See Gutierrez-Soto v. Sessions*, 317 F. Supp. 3d 917, 927 (W.D. Tex. 2017) (declining to dismiss not only Field Office Director but also supervisory respondents because Padilla "explicitly declined to address this precise issue"); *Fuentes-De Canjura v. McAleenan*, No. EP-19-CV-00149-DCG, 2019 WL 4739411, at *3 (W.D. Tex. Sept. 26, 2019) (same).

Other courts have likewise explained, "the proper respondent is not the warden of the facility—a 'non-federal actor who is 'poorly situation to defend federal interests,'—but is instead 'the federal official most directly responsible for overseeing the contract facility.'" *Masingene v.*

Martin, 19-CV-24693, 2020 WL 465587, at *2 (S.D. Fla. Jan. 27, 2020) (*citing Rodriguez Sanchez v. Decker*, No. 18-CV-8798 (AJN), 2019 WL 3840977, at *2-3 (S.D.N.Y. Aug. 15, 2019) (citation omitted); *accord Saravia v. Sessions*, 280 F. Supp. 3d 1168, 1186 (N.D. Cal. 2017) ("the federal official with most immediate control over the facility holding the petitioner—that is, the federal official tasked with ensuring that Yolo County complies with the requirements of its contract with ORR—is the proper respondent.").

Here, the wardens of each facility do not have independent authority to release any Plaintiff from detention and cannot move, transfer, or release Plaintiffs without express directive from the New Orleans ICE Field Office, which is headed by Respondent-Defendant Dianne Witte, the Field Office Director. It is the Enforcement and Removal Office of New Orleans that has custody over Petitioner-Plaintiffs, and in many cases is the same office who took them into custody. (Nelson Decl. ¶¶ 20-21 23-27). ICE is responsible for ensuring that each facility complies with their detention standards, and Defendants acknowledge that ICE has control over some day-to-day operations within their contract facilities. (Nelsen Decl. ¶ 44). In arguing that the immediate custodian rule should apply in the immigration context, Defendants cite to three cases, all of which pre-date *Padilla*, do not discuss the immediate custodian rule, and fail to address the specific facts presented here: whether jurisdiction lies in the only venue appropriate for the respondent and the only court where a remedy can be granted.

In *Padilla*, the appropriate respondent was the one who had the power to "produce the prisoner's body" to the court, 542 U.S. at 435; here that is ICE, because "the wardens have no literal power to produce Plaintiffs." *Calderon v. Sessions*, 330 F. Supp. 3d 944, 952 (S.D.N.Y 2018). Deviating from the default rule here will not lead to forum shopping, inconvenience, expense, or the possibility that other judges would release "distantly removed" petitioners. Defs'

Br. 4-5 As Field Office Director for ERO New Orleans, Defendant Witte is the only person who can grant release. She is thus the proper respondent, and this Court has jurisdiction.

B. The Court Has Jurisdiction Over the Habeas Claims Because the Only Remedy Sought is Release, and it Independently Has Jurisdiction Under Rule 65.

Defendants fundamentally misunderstand the nature of Plaintiffs' habeas claims under § 2241. Even if Defendants' asserted distinction between challenges in habeas to the "fact or duration of detention" and challenges to conditions of detention were actually observed in the Fifth Circuit – a distinction the most recent analysis by the Fifth Circuit rejects[22] – Plaintiffs' challenge sits at the core of the writ. Plaintiffs do not seek judicial intervention in order to improve their conditions of confinement of the sort of attempted by habeas petitioners in every case Defendants rely upon, *see* Defs' Br. 9-10.[23] Indeed, the very premise of the habeas petition – supported by uncontroverted record evidence – is that the conditions producing inevitable and irreparable harm in these circumstances cannot be remediated by any judicial order, which therefore renders the *fact* of their continued detention unlawful under due process. The petition does, therefore, seek "relief from unlawful imprisonment or custody." Defs' Br. 9.. Unlike in *Carson v. Johnson*, 112 F.3d 818, 820-21 (5th Cir. 1997), here, Plaintiffs *do* seek "accelerated release," not an order improving conditions, making habeas the proper vehicle. *See Poree*, 866 F.3d at 244 (petition seeking transfer less restrictive facility "properly sounds in habeas.").[24]

---

[22] In *Poree v. Collins*, 866 F.3d 235 (5th Cir. 2017), cited by Defendants to support the asserted distinction, the court emphasized that "the Supreme Court has not foreclosed" habeas challenges for conditions claims, *id*. at 244, observed that Fifth Circuit caselaw expressly rejects the distinction, *id*. (citing *Coleman v. Dretke*, 409 F.3d 665, 670 (5th Cir. 2005), and then "declin[ed] to address whether habeas is available only for fact or duration claims," *id*.

[23] *Schipke v. Van Buren*, 239 F. App'x 85, 86 (5th Cir. 2007) (rejecting habeas where petitioner sought an order "modifying the conditions of her detention."); *Hernandez v. Garrison*, 916 F.2d 291, 293 (5th Cir. 1990) rejecting habeas petition seeking access to law library and better medical treatment); *Rosa v. McAleenan*, 2019 WL 5191095, at *18 (S.D. Tex. Oct. 15, 2019) ("providing relief on [the habeas claim] would not require the petitioners' release . . . only improving conditions of confinement."). And unlike Petitioners in these cases, a civil rights challenge under §1983 is not available in this case, making habeas the only appropriate remedy.

[24] Petitioners respectfully submit this Court should not follow *Sacal-Micha v. Longoria*, 2020 WL 1518861 (S.D. Tex. Mar. 27, 2020), relied upon by Defendants. First, it does not appear that the court there had the benefit of fulsome briefing on the operation of the asserted distinction between fact and conditions claims in the Fifth Circuit, or a proper

Habeas is a flexible, equitable remedy, *Harris v. Nelson*, 394 U.S. 286, 292 (1969), that offers "broad discretion in conditioning a judgment granting habeas relief . . . 'as law and justice require.'" *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) (quoting 28 U.S.C § 2243). That authority includes orders to release, *Boumediene*, 553 U.S. 723, 779 (2008), so as to "insure that miscarriages of justice . . . are surfaced and corrected." *Harris*, 395 U.S. at 291. Independent of habeas, this Court may order release under its inherent equitable power to remedy conditions endangering the health and safety of people in custody. *See Brown v. Plata*, 563 U.S. 493 (2011).

C. Plaintiffs' Substantial Risk Of Severe Illness And Death Constitutes A Legally Cognizable Injury Which Is Redressable By The Court.

Defendants' characterization of Plaintiffs' injury, short of actually contracting a lethal disease, as "conjectural," is incorrect as a matter of law and fact. As Defendants concede, Plaintiffs need only show a "substantial risk" of injury, Defs' Br. 7 (citing *Stringer v. Whitley*, 942 F.3d 715, 721 (5th Cir. 2019); they need not show the actual onset of the injury, *see Helling v. McKinney*, 509 U.S. 25, 33 (1993) ("It 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."); *M.D. v. Perry*, 294 F.R.D. 7, 34 (S.D. Tex. 2013) ("plaintiff does not need to wait until actually harmed, until the risk of harm is realized"); *Gates v. Cook,* 376 F.3d 323, 339 (5th Cir. 2004) (prisoner "does not need to show that death or serious illness has yet occurred to obtain relief. He must show that the conditions pose a substantial risk of harm."). Judges across the country, like Judge John E. Jones III in central Pennsylvania, have forcefully rejected Defendants'

explanation about why, as in this case, the claims do not seek improved conditions, but release because of due process violations. Second, there was not substantial evidence before that court that conditions in the relevant Texas facility, considered nearly ten days ago in rapidly changing environment; here, the undisputed evidence demonstrates by contrast, that circumstances in Louisiana detention facilities are dire and cannot be improved – that is, habeas release is the only remedy.

argument. *Thakker v. Doll*, 1:20-cv-480-JEJ at 5-6 (M.D. Pa. March 31, 2020) (plaintiffs need not wait "until the pandemic erupts in our prisons.") (attached as Vogel Decl. Exhibit 4).[25]

Defendants claim that any harm is speculative because ICE has "established" that there are no COVID-19 cases in Plaintiffs' facilities. Defs' Br. 8. This is willful, dangerous blindness. ICE recorded no cases *only* because it has not tested the vast majority of detained persons, even those with obvious symptoms. This is why Plaintiffs' face a substantial – indeed, inevitable – risk of imminent harm. The COVID-19 pandemic is moving rapidly and lethally across Louisiana and its neighboring states. Infection and mortality rate in Louisiana and its neighboring states has been much higher than those of other regions, including at least five reported deaths in prison and detention facilities.[26] Given the evidence demonstrating cramped and unsanitary conditions, the impossibility of complying with CDC guidance, as well as the daily entry of staff and guards from the community, and the continued influx and transfer of dozens of new and infected people into detention facilities, it is certain that the disease will become widespread in all detention centers, leaving those with preexisting conditions to be at a particularly high risk of severe illness or death. Bazzano Decl. ¶ 14; Asgari Decl. ¶¶ 13, 17.[27]

---

[25] Days after Judge Jones properly rejected ICE's contention that the habeas petitioners in *Thakker* lacked standing because their injuries were speculative absent a confirmed COVID-19 case at York, ICE confirmed at least one positive case of COVID-19 at that facility. "ICE Detainee in York County Prison tests positive for coronavirus," York Daily Record (Apr. 4, 2020) *available at* https://tinyurl.com/YorkCov19 (last visited Apr. 4, 2020).

[26] Louisiana Department of Health, *Coronavirus (COVID-19)* (March 29, 2020), http://ldh.la.gov/coronavirus/; Mississippi State Department of Health, *Coronavirus Disease* 2019 (COVID-19) (March 29, 2020), https://msdh.ms.gov/msdhsite/_static/14,0,420.html; Alabama Department of Public Health, *Coronavirus Disease 2019 (COVID-19)*, Alabama Public Health (March 29, 2020), http://alabamapublichealth.gov/infectiousdiseases/2019-coronavirus.html. Caroline Habetz, *Fifth Inmate at Oakdale Federal Prison Dies from Covid-19*, https://www.kplctv.com/2020/04/03/fifth-inmate-oakdale-federal-prison-dies-covid-/. Indeed, very courthouse in which this case is lodged is closed because of this obvious risk, and the Chief Justice of the Louisiana Supreme Court, in offering guidance on reducing jail population recognized the substantial risk of "catastrophic for jail staff, the families of jail staff, and inmates." *See supra* Section I(A).

[27] Defendants' redressability argument – which amounts to a nihilistic claim that, because anyone can die at any time, a court can do nothing to mitigate a clearly higher risk of harm – cannot be taken seriously. The consensus of public health opinion is that ICE detention facilities are ticking health timebombs. By contrast, all Petitioners attest that they have a safe home to shelter in, in which they can quarantine and remain safe.

III. INDEPENDENT OF HABEAS, PLAINTIFFS MEET THE TRO STANDARDS.

A. Plaintiffs Are Likely to Succeed on Their Due Process Claims.

Defendants all but ignore the *Bell v. Wolfish* inquiry, which applies when a "detainee attacks general conditions, practices, rules, or restrictions" of their detention. *Hare v. City of Corinth*, Miss., 74 F.3d 633, 643 (5th Cir. 1996). This standard asks whether the relevant conditions or practices that Plaintiffs challenge "are rationally related to a legitimate nonpunitive governmental purpose and whether they appear excessive in relation to" that purpose. *Bell*, 441 U.S. 520, 561 (1979). In a footnote, Defendants cursorily argue that they have a legitimate interest in detention to ensure that noncitizens do not abscond from their removal proceedings. Defs' Br. 13 n. 9. But the relevant inquiry is not whether detention of Plaintiffs in usual circumstances is excessive: these are not usual circumstances. *Thakker, et. al. v. Doll, et. al.*, No 1:20-cv-00480-JEJ at 24 (M.D. Pa. Mar. 31, 2020) ("we must acknowledge that the status quo of a mere few weeks ago no longer applies. Our world has been altered with lightning speed, and the results are both unprecedented and ghastly.").

The relevant inquiry is whether the unsanitary conditions in immigration detention, where social distancing is impossible, and which expose Plaintiffs to the substantial risk of contracting COVID-19 and suffering serious illness or death is excessive in relation to any purported governmental interest.[28] *See id.* at 21. Detention and the inevitable risk of serious harm in these circumstances, for civil detainees, is plainly excessive. As Judge Jones III noted in *Thakker*:

> ICE has a plethora of means other than physical detention at their disposal by which they may monitor civil detainees and ensure that they are present at removal

[28] In *Shepherd* and *Duval*, which fully support Plaintiffs position, the inquiry was not whether pretrial detention by itself served a legitimate government purpose, but "whether legitimate governmental purpose was served by the allowance of the MRSA infection to be present in the […] jail," *Duvall v. Dallas Cty., Tex.*, 631 F.3d 203, 207 (5th Cir. 2011), or whether "the inadequate medical conditions of which Shepherd complains were reasonably related to a legitimate government purpose." *Shepherd v. Dallas Cty., Tex.*, No. CIV.A. 305CV1442-D, 2008 WL 656889, at *7 (N.D. Tex. Mar. 6, 2008).

> proceedings, including remote monitoring and routine check-ins. Physical detention itself will place a burden on community healthcare systems and will needlessly endanger Petitioners, prison employees, and the greater community. We cannot see the rational basis of such a risk.

Id. at 22. Further, "the risk of absconding is low, given the current restricted state of travel in the United States and the world during the COVID-19 pandemic." *Id.* at 23.

Defendants also fail under the deliberate indifference standard for "liability for episodic acts or omissions" because they cannot show that they have taken any effective steps to address the substantial risk of serious harm or death to Plaintiffs. *See Hare* 74 F.3d at 647-8. Defendants concede actual knowledge that COVID-19 is a deadly pandemic that puts Plaintiffs at substantial risk of serious harm. Defs' Br. 12. This risk is even greater now, as there has been a confirmed case of COVID-19 in Pine Prairie and the Alexandria Staging Facility.[29] Defendants state in vague, conclusory terms, that "ICE has shown that it has taken appropriate steps" to limit transmission, identify those exposed, and "timely treat those who are ill." Defs' Br. 12-13 (citing to Nelson Decl. ¶¶ 38-45). But Plaintiffs' firsthand accounts of unsanitary, crowded conditions inside and the abject failure to test or comply with applicable CDC guidance, undermines Defendants' conclusory statement. *See supra* I(B). Additionally, evidence submitted by Plaintiffs demonstrates that immigration detention centers are incapable of mitigating the risks posed by COVID-19, and that the steps cited by Defendants are patently ineffective. *See id*.

Moreover, continued detention during the COVID-19 pandemic actually *undermines* the purported purpose of immigration detention. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). If Plaintiffs are released, ICE can ensure that they attend immigration proceedings through supervised or conditional release. In contrast, the risk of illness or death from continued detention jeopardizes Plaintiffs' ability to attend or meaningfully participate in immigration proceedings.

[29] ICE Guidance on COVID-19: Confirmed Cases (updated April 3, 2020), *available at* www.ice.gov/coronavirus.

Defendants also fail to address Plaintiffs' alternate ground for relief: that continued detention violates Plaintiffs' procedural due process rights. Cite Brief

B. Absent an Injunction Plaintiffs Will Suffer Irreparable Harm, and the Public Interest in Public Health and Balance of Equities Favors Release

The Fifth Circuit has held that "it is not necessary to demonstrate that harm is inevitable," only that there is a "significant threat of injury from the impending action, that the injury is imminent, and that money damages would not fully repair the harm." *Humana, Inc. v. Jacobson*, 804 F.2d 1390, 1394 (5th Cir. 1986). All Plaintiffs meet this standard.

Both medical experts and the CDC establish that individuals in confined spaces such as jails and detention centers are at grave risk of injury. Meyer Decl. ¶¶ 7-17; Bazzano Decl. ¶¶ 15-16; *see Coronel v. Decker*, 20-cv-2472 (AJN) __ WL __ at *8 (S.D.N.Y Mar. 27, 2020) (collecting cases). It is beyond dispute that for medically vulnerable individuals such as Plaintiffs, the risk is heightened. *See* Meyer Supp. Decl. ¶ 40 ("individuals placed in one of these 5 facilities are at a significantly higher risk of infection with COVID-19 as compared to the population in the community and that they are at a significantly higher risk of harm if they do become infected."). The injury is truly *imminent*—if Defendants have not acknowledged that COVID-19 has already reached two of Plaintiffs' detention centers, its onset into the Pine Prairie Detention Center and the Alexandria Staging Facility portends its imminent arrival. Lastly, it is clear that courts cannot remediate this type of harm—not only death, but even the risk of death—with money damages. *Chambers v. Coventry Health Care of Louisiana, Inc.*, 318 F. Supp. 2d 382 (E.D. La. 2004). "[A] remedy for unsafe conditions need not await a tragic event." *Thakker, et. al. v. Doll, et. al.*, No 1:20-cv-00480-JEJ *6 (M.D. Pa. Mar. 31, 2020).[30]

[30] Plaintiffs also demonstrate irreparable harm through a showing that Defendants have violated their constitutional rights, *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 295 (5th Cir. 2012), to substantive and *procedural* due process, the latter of which Defendants do not challenge.

Plaintiffs' release would also serve the public's interest in ensuring public health and safety. *See* Dkt. 2-1 at 22 (citing cases). This includes consideration of individuals in immigration detention centers. Meyer Supp. Decl. ¶ 45 ("Health in jails and prisons is community health."). And despite Defendants' assertion that this Court allow the "orderly medical processes and protocols implemented by government professionals," to run its course, the overwhelming evidence indicates that ICE and the New Orleans Field Office: (a) still have no plan to release vulnerable individuals who are currently in custody, (b) have not and cannot engage in CDC requirements to limit infection; and (c) have not stopped transferring and bringing new people into the detention centers under the New Orleans Field Office's supervision.

Lastly, this Court should ignore Defendants' panicked conjecture that a ruling would open every jailhouse door. Defs' Br. 14. Plaintiffs seek limited and narrow relief petitioning for only the release of *these* seventeen vulnerable individuals before the court, a factor that cannot tilt in Defendants' favor. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009).

CONCLUSION

For the foregoing reasons, and to protect their lives and public health, the Court should order release of Plaintiffs.

Dated: April 4, 2020
New Orleans, Louisiana

Respectfully submitted,

/s/ Matthew S. Vogel

Matthew S. Vogel, La. Bar No. 35363
matt@nipnlg.org
Sirine Shebaya*
sirine@nipnlg.org
NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD
2201 Wisconsin Avenue NW, Suite 200

Washington, DC 20007
718.419.5876

William P. Quigley, La Bar No. 07769
Quigley77@gmail.com
LOYOLA LAW CLINIC
7214 St. Charles Avenue
New Orleans, LA 70118
504.710.3074

Baher Azmy*
bazmy@ccrjustice.org
Ghita Schwarz*
gschwarz@ccrjustice.org
Angelo Guisado*
aguisado@ccrjustice.org
Guadalupe V. Aguirre*
laguirre@ccrjustice.org
Astha Sharma Pokharel*
asharmapokharel@ccrjustice.org
Brittany Thomas*
bthomas@ccrjustice.org
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 11201
212.614.6427

Andrew Free*
Andrew@ImmigrantCivilRights.com
LAW OFFICE OF R. ANDREW FREE
P.O. Box 90568
Nashville, TN 37209
844.321.3221 x.1

Jeremy Jong*
jermjong@gmail.com
3527 Banks Street
New Orleans, LA 70119
504.475.6728

Counsel for Petitioner-Plaintiffs

*pro hac vice applications forthcoming

CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2020, I electronically filed the foregoing document and accompanying proposed order with the Clerk of the Court using the CM/ECF system. I further certify that, in an abundance of caution, I emailed copies of these documents to AUSA Peter Mansfield at the following email address at the U.S. Attorney's Office for the Eastern District of Louisiana:

peter.mansfield@usdoj.gov

Dated: April 4, 2020

/s/ Matthew S. Vogel
Matthew S. Vogel, La. Bar No. 35363
National Immigration Project
of the National Lawyers Guild
2201 Wisconsin Ave, NW, Suite 200
Washington, DC 20007
Tel: (718) 419-5876
Fax: (617) 227-5495
matt@nipnlg.org