

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

Petitioners-Plaintiffs,

v.

Case No.

CHAD WOLF, in his official capacity as Acting Secretary, U.S. Department of Homeland Security; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; MATTHEW ALBENCE, in his official capacity as Deputy Director and Senior Official Performing the Duties of the Director, U.S. Immigration and Customs Enforcement; PATRICK CONTRERAS, in his official capacity as Field Office Director, Enforcement and Removal Operations, Houston Field Office, U.S. Immigration and Customs Enforcement; and RANDY TATE, in his official capacity as Warden of the Montgomery Processing Center,

Respondents-Defendants.

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

INTRODUCTION

1. Across the globe, we have collectively withdrawn, physically isolating ourselves in our homes to protect ourselves from a potentially lethal interaction or touch. But the four

people who bring this lawsuit cannot retreat to safety. Petitioners-Plaintiffs (“Plaintiffs”) are detained at Immigration and Customs Enforcement’s (“ICE”) Montgomery Processing Center (“MPC”). They live, sleep, shower, eat, and wash their hands close to other people—sometimes up to eighty other people. They have no face masks; they do not even always have soap. And yet they are precisely the people who most urgently need protection from the pandemic: they are highly vulnerable to serious illness and death from COVID-19 due to their preexisting medical conditions.

2. On March 23, 2020, ICE learned that an employee at MPC tested positive for COVID-19. Detainees at MPC live in extremely close quarters and cannot engage in risk mitigation as instructed by public health authorities. Nevertheless—despite the presence of COVID-19 at MPC, the enormous risk that the disease poses to vulnerable people’s health and safety, and the impossibility for those detained at MPC to follow the instructions of public health authorities to limit their exposure—ICE continues to hold Plaintiffs in custody.

3. Keeping vulnerable detainees in an environment in which social distancing and the necessary hygiene measures are impossible and waiting for COVID-19 to explode at MPC creates not only a humanitarian crisis but also a constitutional one. As courts have long recognized, the Constitution forbids the government from allowing the people in its custody to suffer and die from infectious disease. The nature of the pandemic and the conditions of confinement at MPC, as an immigration detention center, make it impossible for Respondents-Defendants (“Defendants”) to protect vulnerable Plaintiffs from risk of infection. That risk of harm is “so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk.” *Helling v. McKinney*, 509 U.S. 25, 36 (1993).

4. Plaintiffs are squarely at risk of severe illness and death from COVID-19. All have preexisting medical conditions—including diabetes, asthma, high blood pressure, severe obesity, and a chronic respiratory condition owing to a birth defect—which make them particularly vulnerable to serious complications or death from COVID-19. It is impossible for them to adequately socially distance or take the necessary hygiene measures to prevent contracting COVID-19 at MPC. Moreover, some of the Plaintiffs have already received inadequate medical care while at MPC. This includes inadequate medical care for breathing problems, which is a prevalent and dangerous complication of COVID-19.

5. This Court has the authority and the obligation to order Defendants to comply with the Fifth Amendment and release Plaintiffs from civil detention. Courts across the country have issued similar orders, requiring the immediate release of medically vulnerable individuals like Plaintiffs in ICE detention facilities in light of the potentially fatal consequences of the continuing constitutional violation. The Southern District of Texas has recognized the “especially important” need for “timely release . . . now during the COVID-19 pandemic” from ICE detention *for a detainee at MPC. Ali v. Dep’t of Homeland Sec.*, No. 4:20-cv-00140, Dkt. No. 37 (S.D. Tex. Apr. 2, 2020).

6. For the reasons discussed below, this Court should require Defendants to release Plaintiffs from custody immediately, which is the only means for them to avoid infection by a lethal virus with no vaccine or cure. COVID-19 has already entered MPC. Plaintiffs implore this Court to issue an order to protect their lives.

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction over this matter under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1343 (original jurisdiction), 28 U.S.C. § 2241 (habeas

jurisdiction), and Article I, Section 9, Clause 2 of the United States Constitution (the Suspension Clause).

8. Venue lies in the United States District Court for the Southern District of Texas because Plaintiffs are detained by Defendants at ICE's Montgomery Processing Center, which is located within the Southern District of Texas. 28 U.S.C. § 2242. Venue is proper in the Southern District of Texas because a substantial portion of the relevant events occurred in the District and because multiple Defendants reside in the District. 28 U.S.C. § 1391(b), (e)(1).

PARTIES

Petitioners-Plaintiffs

9. Petitioner-Plaintiff _____ is a 58-year-old man originally from Mexico who has been detained by ICE at MPC since February 2020. Mr. _____ suffers from diabetes, asthma, sleep apnea, and low blood oxygen levels. He also is at high risk of blood clots and takes blood thinners on a daily basis. Following his detention at MPC in February 2020, Mr. _____ became ill and was taken to an emergency room in Conroe, Texas, where he was diagnosed with pneumonia. As a consequence of his health conditions and age, Mr. _____ has a high risk of serious illness or death if he contracts COVID-19.

10. Petitioner-Plaintiff _____ is a 28-year-old woman who was born in Guatemala and who has been detained by ICE at MPC since November 2019. Ms. _____ has a body mass index of 48.3, which exceeds the CDC's threshold of 40 for elevated risk from COVID-19. As a consequence of her health condition, Ms. _____ has a high risk of serious illness or death if she contracts COVID-19.

11. Petitioner-Plaintiff _____ is a 34-year-old man originally from Guatemala who has been detained by ICE at MPC since March 21, 2020. Mr. _____

lungs are underdeveloped due to premature birth, and, as a result, he suffers from chronic respiratory illness. Four years ago, Mr. [REDACTED] was bedridden with the flu for several weeks; he has become ill from the flu every winter for the past ten years. As a consequence of his health conditions, Mr. [REDACTED] has a high risk of serious illness or death if he contracts COVID-19.

12. Petitioner-Plaintiff [REDACTED] is a 37-year-old man originally from Jordan who has been detained by ICE at MPC since August 2019. Mr. [REDACTED] has several respiratory issues and frequently experiences difficulty breathing and chest pain; he experiences shortness of breath if he attempts to walk for more than a few minutes. He suffers from high blood pressure and is on a restricted diet. As a consequence of his health conditions, Mr. [REDACTED] has a high risk of serious illness or death if he contracts COVID-19.

Respondents-Defendants

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

14. Respondent-Defendant ICE is a federal law enforcement agency within the Department of Homeland Security (“DHS”). ICE is responsible for the criminal and civil enforcement of immigration laws, including the detention and removal of immigrants. ERO, a division within ICE, manages and oversees the immigration detention system. Defendant ICE is a legal custodian of Plaintiffs.

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

16. Respondent-Defendant Patrick Contreras is the Field Office Director for Enforcement and Removal Operations ("ERO") in the Houston Field Office of ICE, an agency within the U.S. Department of Homeland Security. ERO is a division of ICE that manages and oversees the immigration detention system. In his capacity as Field Office Director for ERO, Defendant Contreras exercises control over and is a custodian of immigration detainees held at all of the Southeast Texas facilities that house ICE detainees, including the Montgomery Processing Center. At all times relevant to this Complaint, Defendant Contreras was acting within the scope and course of his employment with ICE. He is sued in his official capacity.

17. Respondent-Defendant Randy Tate is Warden of the Montgomery Processing Center in Montgomery County, where all Plaintiffs are detained. Respondent-Defendant Tate is the immediate, physical custodian of Plaintiffs. He is named in his official capacity.

STATEMENT OF FACTS

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

18. In the United States, at least 374,329 people have already tested positive for the virus, and at least 12,064 have died. The United States now has more reported cases than any other country in the world. In Texas, there are at least 8,262 confirmed cases and 154 known deaths.

19. COVID-19 infects people who come into contact with respiratory droplets that contain the coronavirus, such as those produced when an infected person coughs or sneezes. Such droplets can spread between people at a distance of up to six feet. The virus that causes COVID-19 is highly contagious and can survive for long periods on inanimate surfaces, making the disease's spread within a community inevitable once, as in MPC, it has appeared.

20. There is no vaccine to prevent COVID-19. There is no known cure or FDA-approved treatment for COVID-19 at this time. The only known means of minimizing the risk of infection—and therefore the risk of grave illness or death from COVID-19—are maintaining a distance of at least six feet from other people, a practice known as “social distancing,” and increased sanitization, including frequent hand- and face-washing and sanitization of commonly-used surfaces.

21. Outcomes from COVID-19 vary from a mild upper respiratory infection to pneumonia, sepsis, and death. Individuals with serious underlying medical conditions are at the highest risk of severe disease and death if they are infected with COVID-19.

22. COVID-19 can severely damage lung tissue, which requires an extensive period of rehabilitation, and in some cases can cause a permanent loss of respiratory capacity. COVID-19 may also cause inflammation of the heart muscle, known as myocarditis. It can affect the heart muscle and electrical system, reducing the heart's ability to pump. This reduction can lead to rapid or abnormal heart rhythms in the short term and long-term heart failure that limits exercise tolerance and the ability to work.

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

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

25. People in higher-risk categories who contract COVID-19 are more likely to need advanced support. This level of supportive care requires highly specialized equipment that is in limited supply and an entire team of care providers, including 1:1 or 1:2 nurse-to-patient ratios, respiratory therapists, and intensive care physicians.

26. The extensive degree of support that COVID-19 patients need can quickly exceed local healthcare resources, requiring doctors and public health authorities to allocate scarce resources and decide who receives care. By far the best way to avoid further burdening an already over-taxed healthcare system is to enable individuals, particularly those who are highly vulnerable to serious complications from COVID-19, to avoid infection in the first place.

27. According to recent estimates, the fatality rate of COVID-19 is about ten times higher than a severe seasonal influenza. For people in the highest-risk populations, the fatality rate of COVID-19 is about fifteen percent—or one in seven.

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

29. Recognizing the risk of COVID-19 and the need to halt community transmission, the city of Conroe, Texas, in which MPC is located, has been under a stay-home order since March 28, 2020. The order extends through April 30.

II. Conditions at the Montgomery Processing Center Increase the Risk of COVID-19 Infection.

30. The conditions at MPC place immigrant detainees at serious risk of infection with COVID-19.

31. COVID-19 has already spread to MPC. On March 23, 2020, ICE learned that a GEO Group employee working at the Montgomery Processing Center tested positive for COVID-19. GEO Group released a statement stating that the employee had tested positive, that three additional employees had been advised to self-quarantine, and that “one detainee has been isolated from the general population in the medical area of the facility.”¹ Neither ICE nor GEO Group has provided any public update in the intervening sixteen days on suspected COVID-19 cases related to MPC or any efforts to test for COVID-19 at MPC in order to attempt to mitigate its spread.

32. MPC is an enclosed environment in which contagious diseases easily spread. People live in close quarters and are subject to security measures that make the social distancing that is needed to effectively prevent the spread of COVID-19 impossible. Further, while people are held in this facility, they are unable to follow the relevant directives promulgated by medical and public health officials for mitigating the spread of COVID-19.

33. This presents ideal incubation conditions for the rapid spread of COVID-19 once it has been introduced into the facility. Enclosed group environments, like cruise ships or nursing homes, have become the sites for the most severe outbreaks of COVID-19. *See* Ex. 1 (Golob Decl.) ¶¶ 12 & 13. The virus is also spreading at an alarmingly high rate at jails and prisons. At Rikers Island Jail in New York, as of April 7, 2020, 287 prisoners have tested positive for the disease. At Federal Correctional Institution Oakdale I in Louisiana, since March 28, 5 of the approximately 970 prisoners have *died* of COVID-19.

¹ Hamed Aleaziz, *An ICE Detainee Has Become The First To Test Positive For The Coronavirus*, BuzzFeed, March 24, 2020, <https://www.buzzfeednews.com/article/hamedaleaziz/immigrant-ice-detention-facility-coronavirus-test>.

34. To halt the spread of COVID-19, CDC guidance instructs all people to maintain six feet of distance between themselves. The same guidance applies to those who are incarcerated or detained. The CDC emphasizes that this guidance “is especially important for people who are at higher risk of getting very sick.”

35. The nature of their detention at MPC denies people the opportunity to follow these directives. Social distancing is physically impossible. MPC and other immigration detention facilities are not structurally designed to allow for the necessary physical distancing. *See* Ex. 2 (Amon Decl.) ¶¶ 31, 33, 34, 43.

36. At MPC, many immigration detainees live in dormitories that hold up to 90 detainees at a time. Ex. 3 (Decl.) ¶ 12; Ex. 4 (Decl.) ¶ 15. In these dormitories, detainees must share one large room for sleeping, eating, and socializing. Ex. 5 (Decl.) ¶ 11. Their beds, typically bunk beds, are close together, as little as one to two feet apart. Decl. ¶ 15; Ex. 6 (Obser Decl.) ¶ 15. Detainees share communal tables. Obser Decl. ¶ 15.

37. In these larger cells—again, which may hold up to 90 people—detainees are forced to share a communal bathroom, with a small number of sinks, toilets, urinals, and showers. Obser Decl. ¶ 16.

38. These crowded conditions and shared common spaces and objects, such as bathrooms and sinks, maximize the likelihood that COVID-19 will spread rapidly across the facility, infecting vulnerable detainees. Ex. 7 (Venters Decl.) ¶ 23; Amon Decl. ¶¶ 42, 57.

39. Even detainees who do not live in these larger dormitories are in close proximity to both other detainees and facility staff. *See* Ex. 8 (Decl.) ¶ 6. Detainees who share a single cell are in close proximity to their cell mate at all times, and they must interact with

facility staff in close physical proximity. *See* Decl. ¶ 11. They also interact with other detainees during recreation time, when people share a common outdoor space. *Id.* ¶ 13. In an eight-person cell, detainees share a single shower Decl. ¶ 11.

40. Tellingly, the ICE guidance acknowledges that the options to safeguard vulnerable detainees “depend on available space.” As the facility structure and daily routines of MPC demonstrate, immigration detention facilities simply do not have sufficient space to enable social distancing and therefore are incapable of protecting Plaintiffs and other detainees from the risks of COVID-19. *See* Amon Decl. ¶¶ 31, 33, 34, 43.

41. CDC guidance also instructs everyone—including people who are incarcerated or detained—to wash hands often with soap and water for at least 20 seconds and, absent soap and water, to use a hand sanitizer of at least 60% alcohol. CDC guidance directs that detention centers provide detainees with no-cost access to soap, running water, hand dryers or disposable paper towels, and, where possible, hand sanitizer. It also directs that those incarcerated or detained, like all others, cover their mouth and nose with a disposable tissue when coughing or sneezing.

42. Facility staff at MPC have failed to provide detainees with even basic information about COVID-19. Decl. ¶ 10; Decl. ¶ 9; Decl. ¶ 17.

Detainees have not been told by detention staff what the signs and symptoms of COVID-19 are and what to do if they become symptomatic. Decl. ¶ 10; Decl. ¶¶ 9, 10.

Detainees have not been given guidance on personal protective measures, such as recommended handwashing and respiratory etiquette. Decl. ¶ 17; Decl. ¶ 10;

Decl. ¶ 9.

43. MPC fails to provide sufficient resources for detainees to maintain hygiene as the CDC recommends. Multiple Plaintiffs have not been provided with adequate soap or paper towels. Decl. ¶ 7; Decl. ¶ 14; Decl. ¶ 15; *see also* Obser Decl. ¶ 19 (describing pre-COVID-19 interviews with MPC detainees in which detainees expressed concern over a lack of communal soap for handwashing in bathrooms). MPC does not provide detainees hand sanitizer, Decl. ¶ 8; Decl. ¶ 15, or facial tissue.

44. CDC guidance instructs everyone—including people incarcerated or detained, and staff at detention facilities—to wear face masks in settings where social distancing is not feasible. CDC guidance further provides that those detained must wear personal protective equipment, including masks and gloves, while cleaning in an area where a person with a confirmed or suspected case of COVID-19 has been present.

45. ICE officers regularly do not use masks when they interact with detainees at MPC. Ex. 9 (Decl.) ¶¶ 4, 10; Decl. ¶ 14. At times they wear masks around their necks, rather than over their mouths as required to mitigate the risk of spread of COVID-19. Decl. ¶ 14. This failure to properly wear personal protective equipment further increases detainees' risk of exposure to COVID-19.

46. MPC does not provide detainees with masks. Decl. ¶ 9. It also does not regularly provide gloves for detainees to use when cleaning areas of the facility. *Id.*; Decl. ¶ 15.

47. Moreover, as described *infra*, some of the Plaintiffs have already received inadequate medical care at MPC. Decl. ¶¶ 10, 13; Decl. ¶ 8. One immunocompromised detainee has reported that a guard refused to take him to the medical clinic when he requested a visit after developing a cough, a symptom of COVID-19, and that the guard

instead informed him that he did not have coronavirus. Ex. 10 (Decl.) ¶ 4. Detainees described concerns about inadequate medical care at MPC, including lack of follow-up regarding medical issues, problems with medications, and concerns as to the attentiveness of medical care, prior to the COVID-19 pandemic in March 2019. Obser Decl. ¶ 18.

48. There has been rapid spread of COVID-19 in other facilities. In New York City, for example, jails have become an epicenter of infectious spread. Across New York City’s jails, at least 132 incarcerated people and 104 staff had tested positive for COVID-19.²

49. ICE guidance states that “[d]etainees who do not have fever or symptoms, but meet CDC criteria for epidemiologic risk, are housed separately in a single cell, or as a group.” However, experts have concluded that cohorting vulnerable detainees together *increases* their risk of becoming infected with COVID-19. Decl. ¶¶ 14(e), (f), 18; Decl. ¶¶ 31, 49(c).

50. CDC guidance for detention facilities directs that facilities separate detainees with symptoms of COVID-19 from others. It instructs that each individual with a confirmed or suspected case of COVID-19 should be assigned their own room and bathroom. CDC guidance provides that as a last resort, “if there are no other available options,” multiple *laboratory-confirmed* COVID-19 cases—*not* suspected COVID-19 cases—may be placed together.

51. MPC’s failure to separate detainees with COVID-19 symptoms in a manner consistent with best medical practices exposes other detainees to possible COVID-19 infection. Despite exhibiting symptoms consistent with COVID-19, including a diagnosis of pneumonia, Plaintiff has not to his knowledge been tested for COVID-19.

² See Ned Parker et al., *Spread of Coronavirus Accelerates in U.S. Jails and Prisons*, Reuters (Mar. 28, 2020), <https://www.reuters.com/article/us-health-coronavirus-usa-inmates-insigh/spread-of-coronavirus-accelerates-in-u-s-jails-and-prisons-idUSKBN21F0TM>.

Decl. ¶ 12. Plaintiff was confined in a medical observation room with three other individuals and now has been transferred to a dormitory with roughly 80 people. *Id.* ¶¶ 11, 15. Since his transfer to the dormitory, he continues to feel fatigued and unable to walk long distances and has been sweating profusely. *Id.* ¶ 14.

52. Other detainees at MPC have not received adequate medical care for symptoms of COVID-19. Detainees have not been moved out of the dormitories and instead have remained there while exhibiting symptoms consistent with COVID-19, such as coughing and body aches.

Decl. ¶ 15; Decl. ¶ 6. This includes at least one person with asthma. Decl. ¶ 6. This person became ill with flu-like symptoms, body aches, and a cough within two weeks of coming into contact with someone in his dormitory who had twice been hospitalized with pneumonia and was exhibiting flu-like symptoms. *Id.*

53. Failure to regularly test staff and detainees presents a daily risk of spread of the virus throughout the facility. *See* Decl. ¶¶ 22, 49(a), (e), 57. The possibility of asymptomatic transmission means that monitoring staff or detainees for fever is also inadequate to identify all who may be infected and prevent transmission. *Id.* ¶¶ 11, 12, 44, 49(a), (e), 57. This is also true because not all individuals infected with COVID-19 have a fever in early stages of infection. *Id.* ¶ 11.

54. It is impossible to stop the spread of the virus within MPC, where social distancing and necessary hygiene measures are not feasible. *See* Decl. ¶¶ 53, 55, 57. CDC guidance specifically recommends implementing social distancing strategies to increase the physical space between incarcerated and detained persons, “ideally 6 feet between all individuals, regardless of the presence of symptoms,” but Defendants continue to hold Plaintiffs in conditions where this is impossible.

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

55. Without a vaccine or cure for COVID-19, mitigating the risk of contracting the virus is the only known way to protect those who are most vulnerable to serious harm from infection. Decl. ¶ 10; Decl. ¶¶ 6, 11, 13.

56. Because the risk of infection is at its zenith in detention centers—where social distancing measures are impossible to implement, where people share common spaces that are not regularly sanitized, and where individuals are regularly exposed to potential vectors of infection—public health experts with experience in detention and correctional settings have recommended release of vulnerable individuals from custody. Decl. ¶¶ 17, 49(j), 55, 58;

Decl. ¶¶ 7, 24. Indeed, two medical experts for the Department of Homeland Security have concluded that COVID-19 poses an “imminent risk to the health and safety of immigration detainees,” in light of the nature of detention facilities and have recommended release of vulnerable people, both to mitigate their risk and to lessen the strain on local healthcare systems.³

57. Immigration detention facilities lack adequate medical care infrastructure to address the strain of a COVID-19 outbreak. Decl. ¶¶ 20, 31, 33, 34, 43. As a result, individuals who due to their age or medical conditions are at particularly grave risk of severe illness and death while detained and should be released.

³ Scott A. Allen, MD, FACP & Josiah Rich, MD, MPH, *Letter to House and Senate Committees on Homeland Security* (Mar. 19, 2020), available at <https://whistleblower.org/wp-content/uploads/2020/03/Drs.-Allen-and-Rich-3.20.2020-Letter-to-Congress.pdf> [hereinafter “Allen & Rich Letter”].

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

58. Plaintiffs in this case are all individuals who are especially vulnerable to serious illness and death if they are infected with COVID-19, but ICE nonetheless continues to detain them at MPC while they await the adjudication of their immigration cases.

59. . Mr. is a 58-year-old man originally from Mexico. He has been detained by ICE at MPC for roughly one month.

Decl. ¶¶ 1, 4.

60. Mr. came to the United States in 1988 and has lived here since that time as a legal permanent resident. Mr. wife and five children are United States citizens. *Id.* ¶ 3.

61. Mr. has significant health problems. He suffers from diabetes, asthma, sleep apnea, and high cholesterol. He currently has dangerously low blood oxygen levels. He takes medication daily for diabetes, asthma, low blood oxygen levels, and high risk of blood clots. In summer 2019, Mr. was hospitalized for roughly two weeks due to complications from his asthma, diabetes, and high cholesterol. Following discharge, he used oxygen tanks for roughly two months. Since September 2019, Mr. has used a continuous positive airway pressure (CPAP) machine to sleep. *Id.* ¶¶ 6-9.

62. Following his detention at MPC, Mr. became very ill and was taken to the emergency room, where he was diagnosed with pneumonia. He was held in a medical observation room for roughly two weeks and then returned to the general population. Mr. remains ill. His health has declined over the course of his detention at MPC: he has been sweating profusely, he is experiencing severe fatigue, and he is unable to walk long distances. *Id.* ¶¶ 11, 14.

63. To Mr. knowledge, he has not been tested for COVID-19 while detained at MPC. *Id.* ¶ 12.

64. MPC has not provided Mr. with a CPAP machine while he has been detained. He has been falling asleep randomly. Mr. fell off his top bunk onto a concrete floor after suddenly falling asleep, injuring his tailbone. When he sought medical attention at MPC for this injury, staff provided topical cream and did not perform an x-ray; Mr. is still in pain. *Id.* ¶ 10.

65. Mr. uses a nebulizer every day for his asthma. Following his transfer from a medical observation room to the general population, he was not provided with a nebulizer for roughly two weeks. *Id.* ¶ 13.

66. Mr. is currently held in a dormitory at MPC with roughly 80 people, in which the bunks are roughly 1 to 2 feet apart. As of April 4, 2020, there were at least two other people in his dormitory who were exhibiting symptoms of illness, including coughing. *Id.* ¶ 15.

67. Mr. is at high risk of severe illness or death from COVID-19 due to his significant health problem. Decl. ¶ 20(a).

68. Ms. is a 28-year-old woman who was born in Guatemala and whose nationality is recorded by ICE as Nicaraguan. She has been detained by ICE at MPC for roughly five months. Decl. ¶¶ 1, 3.

69. Ms. has lived in the United States since she was brought here twenty-five years ago at the age of three. She has two children, ages seven and nine, who are U.S. citizens. Ms. mother is also a U.S. citizen. *Id.* ¶ 4.

70. Ms. [REDACTED] has significant health problems. She is 5'5" and weighs 290 pounds, meaning that she has a body mass index of 48.1. As a result of a back injury from a serious car accident, in which she was ejected from the vehicle, Ms. [REDACTED] has a pinched nerve and experiences chronic back pain. Due to the same accident, she also experiences chronic headaches. Ms. [REDACTED] has a history of smoking: she began at age 16. By the time she quit smoking a year and a half ago, she was smoking five to six cigarettes a day. Decl. ¶¶ 6-8.

71. Since being detained, Ms. [REDACTED] has sought medical treatment for her chronic back pain resulting from the car accident. However, ICE has not provided comparable medication to the medication that she was taking before being detained, and Ms. [REDACTED] remains in pain. Instead of a combination of muscle relaxants and non-prescription pain medication, she has only been provided with non-prescription pain medication. She is currently taking ibuprofen, which does not provide sufficient relief. *Id.* ¶ 8.

72. Ms. [REDACTED] is unable to socially distance at MPC. She is consistently two to three feet away from her cell mate and regularly interacts in close proximity with ICE officers and facility staff. Additionally, she and other detainees are exposed to each other during recreation. *Id.* ¶¶ 11, 13.

73. Ms. [REDACTED] does not have access to hand sanitizer and has only limited access to paper towels to dry her hands at MPC. *Id.* ¶ 15.

74. Ms. [REDACTED] is at high risk of severe illness or death from COVID-19 due to her significant health problems. Venters Decl. ¶ 20(a).

75. [REDACTED]. Mr. [REDACTED] is a 34-year-old man originally from Guatemala. He has been detained by ICE at MPC since March 21, 2020. Decl. ¶ 2.

76. Mr. [REDACTED] has significant health problems. He was born prematurely and doctors have told him that his lungs never fully developed. As a result, he is extremely susceptible to respiratory illnesses. Every winter for the past ten years, he has become bedridden with the flu. Four years ago, he suffered a particularly severe case of influenza and almost died. He had to stay in bed for several weeks to recover. *Id.* ¶ 4.

77. Mr. [REDACTED] is unable to socially distance at MPC: for example, his bed is in close proximity to others'. *Id.* ¶ 6.

78. Mr. [REDACTED] does not have access to hand sanitizer at MPC. *Id.* ¶ 8.

79. Mr. [REDACTED] is at high risk of severe illness or death from COVID-19 due to his significant health problems. Decl. ¶ 20(a).

80. [REDACTED]. Mr. [REDACTED] is a 37-year-old man originally from Jordan. He has been detained by ICE at MPC for roughly eight months. Jebril Decl. ¶¶ 1, 3.

81. Mr. [REDACTED] has lived in the United States for 13 years, previously as a lawful permanent resident. He has two children, ages three and six, who are U.S. citizens. *Id.* ¶ 4.

82. Mr. [REDACTED] has significant health problems. Mr. Jebril frequently experiences difficulty breathing and chest pain; he experiences shortness of breath if he attempts to walk for more than a few minutes. He suffers from high blood pressure and is on a restricted diet. His father has had two heart attacks. *Id.* ¶¶ 6-8.

83. Mr. [REDACTED] is unable to socially distance at MPC. He lives in a dormitory room with 56 others. The dormitory has only eight showers, which are shared. The living area is also shared, with a few communal tables at which people gather. *Id.* ¶¶ 10-11.

84. Mr. [REDACTED] does not have sufficient access to soap and does not have access to hand sanitizer at MPC. *Id.* ¶ 14.

85. Mr. [redacted] is at high risk of severe illness or death from COVID-19 due to his significant health problems. Decl. ¶ 20(a).

86. Plaintiffs remain detained at MPC despite their vulnerability and despite the confirmed presence of COVID-19 at MPC.

LEGAL FRAMEWORK

I. Immigrant Detainees Are Entitled to Due Process Protections from Exposure to Serious Illness and Potential Death.

87. Immigrant detainees are civil detainees entitled to at least the same Fifth and Fourteenth Amendment due process protections as pretrial detainees. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (“government detention violates th[e] [Due Process] Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections . . . or, in certain special and ‘narrow’ nonpunitive ‘circumstances’” not present here) (emphasis in original); *Edwards v. Johnson*, 209 F.3d 772, 778 (5th Cir. 2000) (“We consider a person detained for deportation to be the equivalent of a pretrial detainee; a pretrial detainee’s constitutional claims are considered under the due process clause instead of the Eighth Amendment.”) (citing *Ortega v. Rowe*, 796 F.2d 765, 767 (5th Cir. 1986)).

88. Under the Due Process Clause, “the State cannot punish a pretrial detainee.” *Hare v. City of Corinth, Miss.*, 74 F.3d 633, 639 (5th Cir. 1996). *See also Bell v. Wolfish*, 441 U.S. 520, 535 (1979). Therefore, civil detainees, including those held in federal immigration detention, are entitled to “more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.” *Youngberg v. Romeo*, 457 U.S. 307, 322 (1982); *In re Kumar*, 402 F. Supp. 3d 377, 384 (W.D. Tex. 2019).

89. The government violates the due process rights of a person in civil detention when the conditions of his or her confinement “amount to punishment.” *Garza v. City of Donna*,

922 F.3d 626, 632 (5th Cir. 2019), *cert. denied sub nom. Garza v. City of Donna, Texas*, 140 S. Ct. 651 (2019). “If ‘the condition of confinement is not reasonably related to a legitimate, non-punitive governmental objective,’ it is assumed that ‘by the [defendant’s] very promulgation and maintenance of the complained-of condition, that it intended to cause the alleged constitutional deprivation.’” *Cadena v. El Paso Cty.*, 946 F.3d 717, 727 (5th Cir. 2020) (quoting *Scott v. Moore*, 114 F.3d 51, 53 (5th Cir. 1997)).

90. To establish that the challenged conditions of confinement amount to punishment, the detainee need not demonstrate an official’s “actual intent to punish because . . . intent may be inferred from the decision to expose a detainee to an unconstitutional condition.” *Shepherd v. Dallas Cty.*, 591 F.3d 445, 452 (5th Cir. 2009). “[E]ven where a State may not want to subject a detainee to inhumane conditions of confinement or abusive jail practices, its intent to do so is nevertheless presumed when it incarcerates the detainee in the face of such known conditions and practices.” *Hare*, 74 F.3d at 644. “[A] pervasive pattern of serious deficiencies” that subjects a detainee to the risk of serious injury, illness, or death “amounts to punishment.” *Shepherd*, 591 F.3d at 454. Such a pattern is evidenced by, for example, continuing to house detainees in conditions that expose them to a known risk of serious infectious disease. *Duvall v. Dallas Cty., Tex.*, 631 F.3d 203, 208 (5th Cir. 2011).

91. In addition, it is cruel and unusual punishment under the Eighth Amendment, and therefore necessarily a violation of civil detainees’ rights under the Fifth Amendment’s Due Process Clause, for a federal official to show “deliberate indifference to a substantial risk of serious harm” to a detainee. *Doe v. Robertson*, 751 F.3d 383, 385 (5th Cir. 2014) (citing *Farmer v. Brennan*, 511 U.S. 825, 828 (1994)); *Hare*, 74 F.3d at 648. This occurs, for example, when

officials “know [] of and disregard [] an excessive risk to inmate health or safety.” *Doe v. Robertson*, 751 F.3d at 388.

92. A detainee “does not need to show that death or serious illness has yet occurred to obtain relief”; instead, they need only “show that the conditions pose a substantial risk of harm to which . . . officials have shown a deliberate indifference.” *Gates v. Cook*, 376 F.3d 323, 339 (5th Cir. 2004). *Cf. Shepherd.*, 591 F.3d at 454 (finding violation of detainee’s due process rights where he “demonstrated that serious injury and death were the inevitable results of the jail’s gross inattention to the needs of inmates with chronic illness”). Federal custodians may not ignore “a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year.” *Helling v. McKinney*, 509 U.S. 25, 33 (1993).

93. Housing detained persons where they are at risk of infectious disease is unconstitutional, even when it “is not alleged that the likely harm would occur immediately and even though the possible infection might not affect all of those exposed.” *Id.* (citing *Hutto v. Finney*, 437 U.S. 678, 682 (1978)). Nor can officials “be deliberately indifferent to the exposure of inmates to a serious, communicable disease on the ground that the complaining inmate shows no serious current symptoms.” *Id.* Further, deliberate indifference to underlying health conditions that make detainees “extremely vulnerable” to “serious . . . injury” is unconstitutional. For example, detention facilities cannot constitutionally permit “the mingling of inmates with serious contagious diseases with other prison inmates.” *Id.* at 34 (citing *Gates v. Collier*, 510 F.2d 1291 (5th Cir. 1974)).

II. Defendants Are Violating Plaintiffs’ Constitutional Due Process Rights.

94. Due process requires that the nature and duration of noncriminal confinement bear “some reasonable relation to the purpose for which the individual is committed.” *Jackson v.*

Indiana, 406 U.S. 715, 738 (1972); *Brown v. Taylor*, 911 F.3d 235, 243 (5th Cir. 2018). The only legitimate purpose, consistent with due process, for federal civil immigration detention is to prevent flight risk and ensure the detained person's attendance for a legal hearing adjudicating their status or potential removal, or to otherwise ensure the safety of the community. *Zadvydas*, 533 U.S. at 699.

95. Keeping vulnerable detainees detained while at severe risk of infection serves no legitimate purpose. Nor is detention under these circumstances reasonably related to the enforcement of immigration laws.

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

97. There is no question that COVID-19 poses a serious risk to Plaintiffs. COVID-19 is highly contagious and can cause severe illness and death. *See supra* ¶¶ 16-25. Plaintiffs are at a heightened risk because of their age and/or underlying health conditions, as described above. *See supra* ¶¶ 56-83.

98. Defendants have knowledge of but are disregarding the serious risk that COVID-19 poses to people like Plaintiffs who have underlying health conditions. Plaintiffs—all of whom are at high risk of serious illness or death from COVID-19—continue to be detained.

99. Defendants have long been on notice of the risk that COVID-19 poses to Plaintiffs and others with serious medical conditions. Indeed, as early as February 25, 2020, two medical experts for DHS raised concerns about the specific risk posed to immigrant detainees as a result of COVID-19 with the agency. On March 19, 2020, they brought their concerns to the House and Senate Committees on Homeland Security and warned of the danger of rapid spread

of COVID-19 in immigration detention facilities. Allen & Rich Letter at 2. They explained that in order to save both the lives of detainees and lives in the community at large, “minimally, DHS should consider releasing all detainees in high risk medical groups[.]” *Id.* at 5.

100. John Sandweg, a former acting director of ICE, has written publicly about the need to release detainees because ICE detention centers “are extremely susceptible to outbreaks of infectious diseases” and “preventing the virus from being introduced into these facilities is impossible.”⁴

101. The circumstances of this case make clear that release is the only means to protect Plaintiffs’ due process rights. Public health experts have made clear that slowing the spread of COVID-19 requires social distancing and increased hygiene and that individuals with Plaintiffs’ underlying medical conditions are vulnerable to serious disease and death if they contract this virus. *See supra* ¶¶ 23, 32, 39, 42; Decl. ¶¶ 3, 14.

102. However, Plaintiffs cannot take the requisite social distancing and hygiene measures while detained at MPC. Plaintiffs share communal bathrooms, in which they share sinks, toilets, and showers with other detainees. They sleep less than six feet away from others. All share their living quarters, and two live in dormitory rooms with up to 80 other people.

Decl. ¶ 15; Decl. ¶ 11. Recreational time is communal. Facility staff do not regularly wear masks, and detainees do not wear masks at all. Soap and paper towels are in short supply, and there is no hand sanitizer or facial tissue. Detainees exhibiting symptoms of COVID-19 remain in close quarters with others.

⁴ See John Sandweg, “I Used to Run ICE. We Need to Release the Nonviolent Detainees.” *The Atlantic* (March 22, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/release-ice-detainees/608536/>.

103. The only course of action that can remedy these unlawful conditions is release from the detention center, where risk mitigation is impossible.

III. ICE Regularly Uses Its Authority to Release People Detained In Custody Because They Suffer From Serious Medical Conditions.

104. ICE has a longstanding practice of humanitarian releases from custody. The agency has routinely exercised its authority to release particularly vulnerable detainees. In fact, ICE has exercised its discretion to release at least one particularly vulnerable individual from MPC since the start of the pandemic. Decl. ¶ 6.

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

106. ICE's exercise of discretion is based in a range of statutory and regulatory provisions, and a long line of directives explicitly instruct officers to exercise favorable discretion in cases involving severe medical concerns and other humanitarian equities militating against detention. For example, under 8 C.F.R. § 212.5(b)(1), ICE has routinely exercised its discretion to release particularly vulnerable detainees. *See also* 8 U.S.C. §§ 1182(d)(5), 1225(b), 1226, 1231; 8 C.F.R. §§ 1.1(q), 212.5, 235.3, 236.2(b).

107. While ICE officers may have been exercising discretion to release less frequently in recent years, the statutory and regulatory authority underlying the use of prosecutorial discretion in custodial determinations remains in effect.

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

109. Here the Due Process Clause of the Fifth Amendment to the U.S. Constitution requires ICE to release detainees where civil detention has become punitive and where release is the only remedy to prevent this impermissible punishment. Plaintiffs seek release on constitutional grounds, and not in the exercise of ICE's discretion. However, the fact that ICE has the authority to release immigrants from custody and has exercised this authority in the past indicates that the remedy Plaintiffs request is neither unprecedented nor unmanageable for the agency.

IV. This Court Has Authority to Order Plaintiffs' Release to Vindicate Their Fifth Amendment Rights, and Such Relief Is Necessary Here.

110. Courts have broad power to fashion equitable remedies to address constitutional violations in prisons. *Hutto v. Finney*, 437 U.S. 678, 687 n.9 (1978). "When 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); *see also 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 low-bond pretrial detainees as necessary to reach a population cap).

111. In light of the imminent threat posed by COVID-19, courts across the country have recognized immediate release as an appropriate and necessary remedy and have accordingly ordered the release of particularly vulnerable detainees in ICE facilities. *See, e.g., Malam v. Adducci*, No. 2:20-cv-10829-JEL-APP, Dkt. No. 23 (E.D. Mich. Apr. 6, 2020) (granting TRO releasing medically vulnerable immigrant detainee because of the risk of COVID-19); *Thakker v. Doll*, -- F. Supp. 3d ----, 2020 WL 1671563 (M.D. Pa. Mar. 31, 2020) (same for eleven

detainees); *Basank v. Decker*, -- F. Supp. 3d ----, 2020 WL 1481503 (S.D.N.Y. Mar. 26, 2020) (same, because “[t]he nature of detention facilities makes exposure and spread of the [coronavirus] particularly harmful”); *Coronel v. Decker*, -- F. Supp. 3d ----, 2020 WL 1487274 (S.D.N.Y. Mar. 27, 2020) (same for four detainees); *Robles Rodriguez v. Wolf*, No. 5:20-cv-00627-TJH-GJS, Dkt. Nos. 32, 35-39 (C.D. Cal. Apr. 2, 2020) (same for six detainees); *see also* *Coreas v. Bounds*, 2020 WL 1663133, at *11 (D. Md. Apr. 3, 2020) (holding that failure to act to address risk to high-risk individuals in light of any confirmed case of COVID-19 among staff members or detainees at the facility “would establish knowing disregard of a serious medical need constituting deliberate indifference”). In fact, a district court decision in the Southern District of Texas has specifically highlighted the “especially important” need for “timely release . . . now during the COVID-19 pandemic” from ICE detention *for a detainee at MPC*, in light of the possible consequences of “significant exposure to those affected by the virus.” *Ali*, Dkt. No. 37.

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

113. Plaintiffs’ medical conditions put them at grave risk of serious illness or death if they contract COVID-19. COVID-19 is exceptionally likely to spread quickly through MPC now that it has been introduced there. By continuing to detain Plaintiffs, Defendants are subjecting Plaintiffs to unreasonable harm, and to unconstitutional punishment. The only course of action that can remedy these unlawful conditions is release from MPC, where risk mitigation is impossible.

CLAIM FOR RELIEF

Violation of Fifth Amendment Right to Substantive Due Process (Substantive Due Process; Unlawful Punishment; Objectively Unreasonable Risk to Health and Safety; Freedom from Cruel Treatment and Conditions of Confinement)

114. The Fifth Amendment of the Constitution guarantees that civil detainees, including all immigrant detainees, may not be subjected to punishment.

115. The federal government violates this substantive due process right when it fails to satisfy its affirmative duty to provide conditions of reasonable health and safety to the people it holds in its custody, and violates the Constitution when it fails to provide for basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety for those in custody. The federal government also violates substantive due process when, acting with deliberate indifference, it subjects civil detainees to objectively unreasonable risks to their health and safety, to cruel treatment, or to conditions of confinement that amount to punishment.

116. By detaining Plaintiffs at MPC, Defendants are subjecting Plaintiffs to an unreasonable risk of contracting COVID-19, for which there is no vaccine and no cure, and which can be lethal. Plaintiffs are particularly vulnerable to serious medical complications from COVID-19 infection and are at unreasonable risk of illness and death as long as they are held in detention.

117. By subjecting Plaintiffs to this risk, Defendants are maintaining detention conditions that amount to punishment and are failing to ensure safety and health in violation of Plaintiffs' due process rights. Likewise, Defendants' continued detention of Plaintiffs at MPC is deliberately indifferent to Plaintiffs' health and safety because only releasing Plaintiffs from custody can adequately protect them from COVID-19. Defendants are aware of the serious risk

posed by COVID-19 and are failing to take the only action that can respond to Plaintiffs' medical needs, which is to release Plaintiffs.

PRAYER FOR RELIEF

WHEREFORE Petitioners-Plaintiffs request that the Court grant the following relief:

- a. Issue a Writ of Habeas Corpus on the ground that Plaintiffs' continued detention violates the Due Process Clause, and order Plaintiffs' immediate release, with appropriate precautionary public health measures;
- b. In the alternative, issue injunctive relief ordering Defendants to immediately release Plaintiffs, with appropriate precautionary public health measures, on the grounds that their continued detention violates the Due Process Clause;
- c. Issue a declaration that Defendants' continued detention of Plaintiffs violates the Due Process Clause;
- d. Award Plaintiffs their costs and reasonable attorneys' fees in this action under the Equal Access to Justice Act ("EAJA"), as amended, 5 U.S.C. § 504 and 28 U.S.C. § 2412, and on any other basis justified under law; and
- e. Grant any other and further relief that this Court may deem fit and proper.

//

Dated: April 8, 2020

David C. Fathi**
Eunice H. Cho**
Lauren Kuhlik*
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION, NATIONAL PRISON PROJECT

Respectfully Submitted,

/s/ Andre Segura
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* *Motions to appear pro hac vice forthcoming*

***Motions to appear pro hac vice
forthcoming; not admitted in DC; practice
limited to federal courts.*

****S.D. Tex. renewal forthcoming*

Verification by someone acting on Petitioners' behalf pursuant to 28 U.S.C. § 2242

We are submitting this verification on behalf of the Petitioners because we are some of the Petitioners' attorneys. We have each discussed with one or more Petitioner and collectively have discussed with all Petitioners the events described in this Petition. On the basis of those discussions, we hereby verify that the statements made in the attached Petition for Writ of Habeas Corpus are true and correct to the best of our knowledge.

Dated: April 8, 2020

/s/ Bernardo Rafael Cruz

Bernardo Rafael Cruz, Attorney for Petitioners

/s/ Rochelle M. Garza

Rochelle M. Garza, Attorney for Petitioners

/s/ Kathryn Huddleston

Kathryn Huddleston, Attorney for Petitioners

/s/ Noor Zafar

Noor Zafar, Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing motion via the Court's ECF filing system and via email courtesy copy to the office of the United States Attorney for the Southern District of Texas.

Dated: April 8, 2020

/s/ Andre Segura

Andre Segura